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2709 No. 13079

United States
Court of Appeals
For the Ninth Circuit.

RAY P. KOENIG,

Appellant,

vs.

DONALD CORCORAN,

Appellee.

Transcript of Record

Appeal from the United States District Court,
for the District of Montana.

FILED

JAN - 1 1952

PAUL P. O'BRIEN
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

P. W. LANIER and P. W. LANIER, JR.,
Fargo, North Dakota;

ANDREW G. SUTTON,
Billings, Montana,
For Plaintiff and Appellant.

H. B. LANDOE,
Bozeman, Montana,
For Defendant and Appellee.

In the United States District Court for the District
of Montana, Helena Division

No. 502

RAY P. KOENIG,

Plaintiff,

vs.

DONALD CORCORAN,

Defendant.

COMPLAINT

Plaintiff for right of action alleges:

I.

That he is a citizen of the State of North Dakota and that the defendant is a citizen of the State of Montana, and that the amount involved herein is in excess of Three Thousand Dollars, exclusive of costs.

II.

That on the 8th day of March, 1942, plaintiff married Eunice Jantvold in Walker, County of Cass, Minnesota, and thereafter lived in the State of Minnesota up to and until July, 1947, when plaintiff's wife left him and went to the home of her parents in Bemidji, Minnesota, where she stayed with the exception of a day or two at a time when she would come back and stay with plaintiff, and that this continued until Christmas, 1947, when plaintiff's wife advised him that she didn't love him and wanted a divorce; that plaintiff asked his wife if there was another man involved in the

case and she said there was not; that thereafter on or about the 7th day of May, 1947, in Crow Wing County, Minnesota, plaintiff's wife obtained a divorce from him which was not contested by plaintiff.

III.

That prior to said divorce and prior to the time that the said wife left plaintiff, the defendant who was a resident of the State of Montana, without the knowledge of this plaintiff, became acquainted with plaintiff's said wife and at regular intervals plaintiff's said wife would leave plaintiff and be gone for several weeks at a time [2*] representing to plaintiff that she was with her parents or with her kinfolk and during such times, the said defendant was in the company of plaintiff's wife; that these regular absences on the part of plaintiff's wife continued up to the time that she left him; plaintiff was surprised and did not understand just what had happened to change the attitude of his wife toward him; plaintiff knew nothing about her acquaintance with said defendant and when she said that she was going to sue him for divorce, he made no effort to defeat her claim for divorce believing that for some reason unknown to him she had ceased to love him; that he did not suspect that there was any man involved in the matter; that born to plaintiff and his said former wife was a boy, Terry Charles, now seven years of age, and now with his said mother.

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

IV.

After the granting of said divorce, for the first time, plaintiff learned that his wife and the defendant were keeping company with each other and engaging in social relations; that since said divorce said wife has married the defendant and is now residing with him in the State of Montana and has with her the child of plaintiff and his said former wife.

V.

Plaintiff charges that while plaintiff was happily married and supporting his said wife, defendant in November, 1947, met her at or near Bemidji, Minnesota, and began regularly keeping company with her; that in February, 1948, he ascertained that she was married; that from the time of meeting the said wife of plaintiff in November, 1947, he alienated her affections, and in February or March, 1948, after learning of said marriage, he continued to keep company with her and proceeded to carnally know her with knowledge of the fact she was married; that in pursuance of her loss of affections aforesaid, plaintiff's wife obtained a divorce from the plaintiff, and married the defendant.

VI.

That by reason of the premises, plaintiff has been and still is wrongfully deprived of the society, comfort and aid of his wife and child and has been put to great trouble and expense on account of her absence and has suffered great distress of both mind and body to his damage in the sum of One Hundred Thousand Dollars (\$100,000.00). [3]

Wherefore, plaintiff demands judgment against defendant in the sum of One Hundred Thousand Dollars (\$100,0000.00) and his costs and disbursements herein.

Dated this 26th day of October, 1950.

P. W. LANIER,

P. W. LANIER, JR.,

LANIER & LANIER,

Attorneys for Plaintiff.

JOHN B. TANSIL,

Attorney for Plaintiff.

[Endorsed]: Filed November 3, 1950.

[Title of District Court and Cause.]

ANSWER

Comes now the Defendant in the above-entitled action and for answer to Plaintiff's complaint Defendant admits, denies, and alleges as follows:

I.

Admits the allegations contained in paragraph I of the Plaintiff's complaint.

II.

For answer to the allegations contained in paragraph II of Plaintiff's complaint, Defendant alleges that he does not have sufficient information, knowledge or belief to form an opinion as to the

truth or falsity of the allegations therein set forth and therefore denies the same, except as to the allegation that Plaintiff's wife obtained a divorce from Plaintiff.

III.

For answer to allegations contained in paragraph III of said complaint, Defendant denies the same.

IV.

For answer to the allegations contained in paragraph IV of said complaint, Defendant admits that he is married to the former wife of Plaintiff and resides in the State of Montana and denies all other allegations and matters contained in said paragraph IV.

V.

Defendant denies each and every allegation, matter and thing contained in paragraph V of said complaint, except that he admits he is married to the former wife of said Plaintiff.

VI.

Defendant denies the allegations contained in paragraph VI of said complaint. [5]

For a further and separate defense to said complaint, the Defendant alleges:

I.

That Plaintiff's wife, Eunice, separated from the Plaintiff prior to any acquaintance on the part of the Defendant with said Plaintiff's wife, and that Defendant's acquaintance was subsequent to the

alleged alienation of affections of Plaintiff's wife for the Plaintiff herein, and Defendant is informed, and believes, and therefore alleges, that said separation on the part of the Plaintiff and his wife, and the loss of affections of Plaintiff's wife for the Plaintiff, and the resulting divorce of said parties was caused by the Plaintiff's own conduct toward his said wife Eunice.

Wherefore Defendant prays that Plaintiff take nothing by his said complaint and that the Defendant be dismissed with his costs.

Dated this 27th day of March, 1951.

H. B. LANDOE,
Attorney for Defendant.

State of Montana,
County of Gallatin—ss.

Donald Corcoran being first duly sworn, upon oath, deposes and says:

That he is the Defendant named in the foregoing action; that he has heard read the foregoing answer and knows the contents thereof and that the matters and things therein set forth are true of his own knowledge, information and belief, and as to those matters set forth upon information and belief, he believes them to be true.

DONALD CORCORAN.

Subscribed and sworn to before me this 31st day of March, 1951.

[Seal] H. B. LANDOE,
Notary Public for the State of Montana Residing
at Bozeman, Montana.

My commission expires Oct. 20, 1951.

[Endorsed]: Filed April 7, 1951. [6]

In the District Court of the United States in and
for the District of Montana

No. 502

RAY P. KOENIG,

vs.

DONALD CORCORAN.

ORDER

Counsel for respective parties, with the jury, present as before and trial of cause resumed.

Thereupon Ray P. Koenig was sworn and examined as a witness for the plaintiff, whereupon plaintiff rested.

Thereupon the jury was duly admonished by the Court and excused until 2:00 p.m., whereupon, in the absence of the jury, counsel for defendant moved the Court for an order of dismissal of this cause on the ground that upon the facts and the law that plaintiff has shown he has no right to

relief. Thereupon said motion was argued by counsel, whereupon counsel for plaintiff moved the Court for leave to reopen his case for the purpose of introducing further proof, which motion was submitted and by the Court taken under advisement, and a recess taken until 1:30 p.m. this day.

Thereafter, at 1:30 p.m. counsel for respective parties were present as before. Thereupon counsel for plaintiff announced that in lieu of his motion to reopen plaintiff's case, he now moves the Court to amend the pleadings to conform to the proof, pursuant to Rule 15(b) and (c) of the Rules of Civil Procedure, by substituting a new paragraph for paragraph 5 of the complaint, which amendment was read into the record. Thereupon said motion was argued by counsel and submitted, whereupon, after due consideration, Court ordered that the motion be granted and the amendment allowed.

Thereupon further argument was made by counsel on the defendant's motion to dismiss, whereupon counsel for plaintiff renewed his motion for leave to reopen plaintiff's case, which latter motion was by the Court denied. Thereupon the jury was returned into court.

Thereupon, after due consideration, Court ordered that the defendant's motion to dismiss the cause be and is granted, and that the jury be discharged from further consideration of the cause.

Thereupon counsel for plaintiff excepted to the ruling of the Court in dismissing the cause, and gave oral notice of appeal.

Entered in open Court at Helena, Montana, June 15, 1951.

H. H. WALKER,
Clerk. [7]

[Title of District Court and Cause.]

JUDGMENT

This cause came on regularly for trial before the Honorable W. D. Murray, Judge of the above-entitled Court, on the 14th day of June, 1951. A jury of twelve persons was regularly impanelled and sworn to try said action; witnesses on the part of the plaintiff were sworn and examined. The plaintiff was represented in said trial by P. W. Lanier, Esquire, of Fargo, North Dakota, and Andrew Sutton, Esquire, of Billings, Montana. H. B. Landoe, Esquire, of Bozeman, Montana, represented the Defendant.

At the conclusion of the testimony of the witnesses for the Plaintiff and declaration in open Court by counsel for the Plaintiff that Plaintiff rested his case, counsel for the Defendant made a motion in open Court for a dismissal of said action upon the ground that upon the facts and the law, the Plaintiff had shown no right to relief. The Court thereupon heard argument of counsel in support of said motion and argument by counsel for the Plaintiff in opposition thereto and that prior to the ruling upon said motion by the Court, counsel for Plain-

tiff asked leave to re-open Plaintiff's case to introduce further evidence and that the Court, after considering the request of the Plaintiff to re-open his case, denied said request, and the Court having considered the motion to dismiss and having heard the arguments pertaining thereto, and being fully advised in the premises, did, thereupon grant the motion to dismiss this action.

Now, therefore, it is ordered, adjudged, and decreed that Plaintiff take nothing by this action.

Dated this 22nd day of June, 1951.

H. H. WALKER,
Clerk of the United States Court for the District
of Montana, Helena Division.

[Endorsed]: Filed and entered June 22, [8]
1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Ray P. Koenig, plaintiff in the above-entitled action, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the Order of the United States District Court for the District of Montana, Helena Division, dismissing the Complaint, and from the final judgment entered thereon in the above-entitled action, upon all questions of fact and law.

Dated July 9, 1951.

P. W. LANIER,

P. W. LANIER, JR.,

LANIER & LANIER,

ANDREW G. SUTTON,

By P. W. LANIER,

Attorneys for Plaintiff.

[Endorsed]: Filed July 10, 1951. [9]

In the United States District Court, District of
Montana, Helena Division

No. 502

RAY P. KOENIG,

Plaintiff,

vs.

DONALD CORCORAN,

Defendant.

Before: The Honorable W. D. Murray,
U. S. District Judge.

REPORTER'S TRANSCRIPT

June 14 and 15, 1951

P. W. LANIER, Esq.,

A. G. SUTTON, Esq.,

Attorneys for Plaintiff.

H. B. LANDOE, Esq.,

Attorney for Defendant. [17]

DONALD A. CORCORAN

the defendant, called as a witness on behalf of the
plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Lanier:

Q. State your name to the Court and jury.

A. Donald A. Corcoran.

Q. Where do you live, Mr. Corcoran?

(Testimony of Donald A. Corcoran.)

A. I live in Bozeman, Montana.

Q. And before you came to Bozeman, where did you live?

A. I lived in Bemidji, Minnesota. [47]

Q. Before then, where did you live?

A. At Webster, Wisconsin.

Q. You were interested in business in those three points? A. That's right, sir.

Q. And you are now?

A. That's right, sir.

Q. When did you first meet the plaintiff's wife?

A. It was in late November, 1947.

Q. Where did you meet her?

A. I met her at a place called the Dutchess, which was about a mile west of the City of Bemidji.

Q. How did you come to meet her?

A. I was out there with some friends. It was during the deer season time. We had come back from a hunting trip, and we went out there to the Dutch Tavern, the Dutchess, I should say, and at that time she was there, she was working there.

Q. Were you formally introduced?

A. I would say yes, that I was formally introduced. She was sitting at a table when we came up there.

Q. By whom?

A. By a fellow by the name of Elicia Utter.

Q. That was the first time you ever saw her?

A. No, I would not say it was the first time I had ever seen her.

Q. When did you first see her? [48]

(Testimony of Donald A. Corcoran.)

A. Oh, I would say the start of that hunting trip. I picked up a fellow out there to go up on the hunting trip.

Q. Did you inquire who she was?

A. No, I didn't.

Q. But on the night you met her, had you inquired who she was?

A. No, I didn't even do that.

Q. After you met her—do you remember the date?

A. No, I don't. It was in the last part of November, that I do know; it was deer season time. That is all I know.

Q. Were you at the Dutchess shortly after the 11th of November, Armistice Day?

A. I could have been, but I don't recall, sir.

Q. After you met this wife of the plaintiff, did you or not have social engagements with her?

A. No, I did not, sir.

Q. During the month of November?

A. No, sir.

Q. During the month of December?

A. No, sir.

Q. You never went with her at any place?

A. No, sir, not at all in that time.

Q. You never saw her anywhere?

A. Yes, sir, I did see her.

Q. You knew that she was married? [49]

A. I did not, sir.

Q. When did you find out she was married?

(Testimony of Donald A. Corcoran.)

A. It was sometime in the latter part of February was the first time I knew she was married.

Q. And from November until December, is your position that you never were with her? [50]

* * *

C. H. STROWBRIDGE

called and sworn as a witness in behalf of the plaintiff, testified:

Direct Examination

By Mr. Lanier:

Q. Your name is C. H. Strowbridge?

A. That's right.

Q. You live in Bemidji, Minnesota?

A. I do.

Q. How long have you lived there?

A. All my life. [54]

Q. In what business are you now engaged?

A. Running a tavern.

Q. What is the name of your tavern?

A. Dutchess Tavern and night club.

Q. How long have you run that tavern?

A. I lived there for ten years, but I didn't exactly run it all the time, but I've been around there for ten years.

Q. How far is that tavern located from the city of Bemidji, Minnesota? A. A mile.

Q. And adjacent to the tavern is there a residence? A. Yes.

Q. How far is that from the tavern?

(Deposition of C. H. Strowbridge.)

A. Oh, just a little ways.

Q. Approximately a hundred feet, or more or less?

A. A hundred feet.

Q. Is the tavern that you operate now a newly-constructed tavern?

A. Yes, it's about three and a half years old.

Q. Before that time was there a tavern there?

A. Yes, an old one.

Q. And were you interested in the old tavern?

A. Yes.

Q. Now, this residence, that is near the tavern that you [55] mentioned?

A. Yes.

Q. Whose residence is that?

A. Mine.

Q. How long have you resided and made that your home in that place?

A. A little over eleven years.

Q. How many rooms are there in that residence?

A. Oh, about seven.

Q. Is it a two-story or single-story house?

A. Two story.

Q. Are there bedrooms upstairs and downstairs?

A. The upstairs is bedrooms and there's one downstairs.

Q. Are you married or single?

A. Single.

Q. Were you married in the fall of 1947?

A. Yes.

Q. Whom did you marry?

A. Marion Jantvold.

Q. Was she a resident of Bemidji, Minnesota?

A. Yes.

(Deposition of C. H. Strowbridge.)

Q. Do you know Eunice Corcoran, the former wife of Ray Koenig? A. Yes.

Q. State what relation, if any, she is to your wife with [56] whom you were living in 1947.

A. They're sisters.

Q. They are sisters? A. Yes.

Q. Do you know the plaintiff in this case, Ray Koenig? A. Yes.

Q. How long have you known him?

A. Oh, 15 years anyway, maybe more, 15 or 17, something like that.

Q. Do you know whether or not he is a Bemidji boy? A. Yes, he is.

Q. What's that?

A. Yes, he is; he is, yes.

Q. Did you know the defendant's wife, Mrs. Corcoran, during the years 1947 and 1948?

A. Yes.

Q. Do you know whether or not during those years up to May, 1948, she was the wife of the plaintiff in this case? A. Yes.

Q. Was she or not? A. She was.

Q. Do you know where the residence of the plaintiff and his then wife was in the fall and summer of 1947

A. Fall and summer of 1947?

Q. Yes. Where did he live at that time? [57]

A. Brainerd.

Q. At Brainerd. And do you know what business the plaintiff was engaged in at Brainerd?

A. He's a mechanic.

(Deposition of C. H. Strowbridge.)

Q. Do you know what garage or place he worked for there?

A. Yes, he worked for the Auto Marine Sales or Riverview Packard Company, I don't know, or some such a name.

Q. Do you know the defendant, Corcoran?

A. The defendant in this lawsuit, yes, I know him.

Q. Can you tell me approximately when you first met him?

A. Oh, I'd say it was in the fall of 1947.

Q. Do you remember that you ever saw the defendant, Corcoran, in the company of Eunice Koenig at that time, the present Mrs. Corcoran?

A. At that time?

Q. In the fall of 1947? A. Yes.

Q. Well, can you give me approximately when you first saw them together in the fall of 1947?

A. Oh, I would say about November.

Q. Have you any way or anything that brings to your mind or refreshes your recollection of the occasion or the time when you first met him?

A. I can't just remember the first time exactly.

Q. When did the new building, the night club that you [58] have there, when did you open that?

A. Armistice Day, 1947.

Q. That was November 11, 1947?

A. That's right.

Q. Well, would you say, or are you in a position to say, whether or not you saw these people together at that time or prior to that time or after that time?

(Deposition of C. H. Strowbridge.)

A. Well, it was right around that time when I first met him.

Q. Right around that time when you first met him. And where did you first see him?

A. I believe it was in there.

Q. In that club?

A. As near as I can remember, that's where it was.

Q. You saw them together? A. Yes.

Q. Was it night time?

A. I wouldn't say they were together the first time I seen him because I don't remember.

Q. Now, the first time you saw them they might have been together?

A. They might have been the first time, I don't know.

Q. Along about that time, November 11th or shortly thereafter, 1947, did you see them in your night club together? [59]

A. I've seen them in there off and on, but I don't remember the dates, you know.

Q. Now, state whether or not the defendant's wife, who was then the wife of this plaintiff, would visit in your home and stay with you when she was in Bemidji?

A. She was staying with me then.

Q. She was staying with you. State whether or not she occupied a room, had her sleeping quarters in your place? A. She stayed in the house.

Q. And your wife, who was there at that time, was a sister of Mrs. Koenig, is that right?

(Deposition of C. H. Strowbridge.)

A. Yes, that's right.

Q. Well, now, during the time she was there, visiting there in your home from time to time, did you see her in the company of the defendant, Corcoran?

A. During that—what time?

(Q. 1947 and 1948? A. I did at times.)

(Note: The above question and answer in parentheses, which appeared on page 8 of the original deposition, was ordered stricken by the Court at proceedings in chambers, as shown pp. 4-8 of this transcript, and was not read to the jury.)

Q. Well, state whether or not you would see them together as much as two or three times a week at your club at times?

Mr. Landoe: May I interrupt, Mr. Lanier? [60]

Mr. Lanier: Yes.

Mr. Landoe: On the matter of objections, I don't know where we stand on them, and if it is agreeable with you we can raise objections at the time of the trial.

Mr. Lanier: Under the rules you have a right to do that; in other words, though, if you want a stipulation to that effect, I will be glad to stipulate with you that that may be done.

Mr. Landoe: That is agreeable, and so understood.

Mr. Lanier: Yes. Now, if you'll read the last question.

(Deposition of C. H. Strowbridge.)

(Question read.)

A. Oh, some weeks, some weeks I wouldn't see them at all.

Q. Some weeks you would?

A. Some weeks.

Q. And some weeks you wouldn't see them at all?

A. That's right.

Q. I take it you are not in a position to specify definitely which weeks you saw them and which weeks you didn't?

A. That's right.

Q. Well, now, did that occur during the fall of 1947, and during the winter and early spring months of 1948?

A. Yes. [61]

* * *

Cross-Examination

By Mr. Landoe:

Q. I believe you testified you had known Ray Koenig for a little over 15 years? [75]

A. Yes, that's correct.

Q. And he is the plaintiff in this litigation versus Donald Corcoran, is he not?

A. Yes.

Q. How well do you know Ray Koenig? Did he work for you ever?

A. Well, he worked for me once up on the farm when we were farming.

Q. Did he ever do any work for you at the tavern?

A. He was never hired by me at the tavern.

Q. Did he ever help you out at the tavern?

(Deposition of C. H. Strowbridge.)

A. He did a few times, but he was never on the pay roll or never hired at the tavern. The only time I ever hired him was work around the farm.

Q. But he has done some work around the tavern?

A. Yes, he used to tinker around there, around the tavern.

Q. What do you mean by tinker around, did he stay around there for days at a time, or what?

A. That's right, he and his wife both did when he was married.

Q. They hung around this tavern some?

A. And in the house.

Q. And in the house. Over what period would that extend, several weeks or months or what? [76]

A. I would say the last 11 years.

Q. In other words, they were in and out there——

A. Off and on.

Q. ——for approximately 11 years?

A. Yes.

Q. During which time Ray and his wife, Eunice, would both be in and about the tavern, is that correct?

A. Sometimes they would be.

Q. During those times you say Ray Koenig would help you out in the tavern?

A. Well, he never was hired to work in that tavern, but I have seen times he would come in there and maybe sweep the floor and things like that once in a while. He would be staying at the house.

(Deposition of C. H. Strowbridge.)

Q. In other words, you have been quite friendly with him? A. Oh, yes.

Q. Is that true? A. Yes.

Q. He is what you would consider one of your good friends? A. Well, he always was.

Q. Now, you testified that you were married to Marion; is that correct?

A. That's right. [77]

Q. And that she was a sister, or is a sister, of Eunice's? A. Yes.

Q. Being referred to, I believe, in your testimony as the wife of Ray Koenig? A. Yes.

Q. How long were you married to her?

A. Oh, 12 years.

Q. Until what date?

A. A year ago last September I got a divorce.

Q. A year ago last September?

A. That's right.

Q. That would be what year, 1948 or 1949?

A. 1949.

Q. You were divorced in 1949? A. Yes.

Q. I believe you testified in your direct testimony that it was 1948; do you have that clear in your mind?

A. Yes, my wife—we separated then, but I didn't get a divorce until 1949. Separated April 3, 1948, and divorced September, 1949.

Q. And you became separated on April 3, 1948?

A. Right.

Q. Now, who filed for this divorce?

A. I did. [78]

(Deposition of C. H. Strowbridge.)

Q. And that was in September, you say?

A. No, I filed before that. Became final in September, 1949.

Q. I believe you testified that Eunice Koenig was living at your place in the fall of 1947?

A. Yes.

Q. When did she come there?

A. She came there in the month of July, 1947.

Q. And stayed in your home?

A. That's right.

Q. For how long?

A. Well, she come there and made that her home until she left the next June, sometime in July, I believe she left there then.

Q. In 1948? A. Yes.

Q. The subsequent year? A. Yes.

Q. Did she have a child with her?

A. Yes.

Q. Did the child make his home at your residence during that time? A. That's right.

Q. And that was her home during that period?

A. That's right. [79]

Q. Ray wasn't living there during that time, I don't suppose? A. No.

Q. Where was he living? A. Brainerd.

Q. During that time do you know whether or not she was taking treatments from a doctor in Brainerd, do you recall that?

A. She had some dentist work done down there, I know.

Q. Well, do you recall—if you don't, okay—or

(Deposition of C. H. Strowbridge.)

do you have any knowledge as to whether or not she was taking treatments from a physician in Brainerd?

A. All I remember is she told me about getting her teeth fixed.

Q. All right. She left—she lived at your house from April until June or July, I should say, 1947, until approximately June of 1948, you say?

A. Sometime in June.

Q. During that time was she in and about your tavern a great deal? A. Oh, quite a little.

Q. Did she help you out any?

A. Oh, she didn't do much in the tavern.

Q. Did she occasionally help you with tables and that sort of thing? [80]

A. Not during that time. She did before that, but not during that time.

Q. Was she in the tavern a great deal during that time?

A. Oh, she was in there off and on quite a bit.

Q. What was she doing in there?

A. I didn't see her do much of anything.

Q. Did you see her do any drinking?

A. Oh, at times, we all had to do some drinking.

Q. That is what the place is run for, is it not, to serve drinks; there is nothing else served there, is there? A. No.

Q. It is strictly a tavern for drinking intoxicating liquors, is it not; that's what it is run for, is that right? A. Well, 3.2 beer.

(Deposition of C. H. Strowbridge.)

Q. Well, 3.2 beer, is that the kind of beer you serve out there? A. That's right.

Q. You don't have a license to sell anything beyond 3.2 beer; is that correct?

A. No, not today.

Q. So the only thing you have a license to sell is 3.2 beer and no liquor; is that correct?

A. That's correct, but at that time, when she was staying with me, from 1948—from 1947 until 1948, during that [81] length of time I wasn't running the tavern myself. I was living there, but I wasn't running the tavern.

Q. Well, who owned the building?

A. I did.

Q. And why weren't you running the tavern?

A. Somebody else was.

Q. What was the reason why you weren't running the tavern; was it because you didn't have a license? A. Yes, that's true.

Q. Is that the reason? A. Yes.

Q. That is the reason why someone else was running it, is it?

A. At that time somebody else held the license.

Q. And the reason for that was why? Was it because your license was revoked?

A. Yes, six years before that.

Q. So that during that period of time, from April, 1947, until June, 1948, you saw a great deal of Eunice Koenig, did you not? A. Oh, yes.

Q. Why you had occasion to see her practically

(Deposition of C. H. Strowbridge.)

every day that she was in the city of Bemidji, in and about? . . . A. Sure.

Q. And you know a great deal about her affairs during [82] those months, do you not—you were in a position to know?

A. Oh, I would say yes.

Q. She was in and about your tavern a great deal, day after day, almost; is that not true?

A. Well, after April she was working in town here during the day.

Q. After April of what year?

A. 1948. [83]

* * *

Q. Was Ray Koenig in the army in 1946?

A. I believe so, I think that is when he got out.

Q. All right, and you saw Eunice in the company of James Levitt in 1946; is that correct?

A. I believe so.

Q. Several times? [86] A. Oh, yes.

Q. That was while she was still married to Ray Koenig? A. Right.

Q. Now, do you remember a gentleman or do you know a gentleman by the name of Russell McKenzie of Bemidji? A. Right.

Q. You know him quite well, do you not?

A. Yes, sir.

Q. And you have been out with Russell McKenzie a number of times, I presume, yourself; is that right?

A. I have been out with him maybe three times, four times.

(Deposition of C. H. Strowbridge.)

Q. And you have been out with Russell McKenzie when he had a date with Eunice Koenig, have you not?

A. I was with Russell McKenzie once when he had Eunice with him.

Q. Yes? A. Right.

Q. And she went out with him several times in the fall of 1947, did she not? You know that of your own knowledge?

A. I only seen him out with her once when I was with him; that was in the fall of 1947, about in the month of October.

Q. Do you know when Eunice got her divorce?

A. She told me she got it in May. [87]

Q. Do you have any knowledge as to whether or not she celebrated her divorce with Russell McKenzie on the 7th day of May, 1948; do you have any knowledge of that?

A. I can't remember when she celebrated her divorce.

Q. Do you know Everett Utter? A. Yes.

Q. You have seen Eunice run around with Everett Utter? A. I can't say that I did.

Q. In the early part of 1948, did you ever see them?

A. I have seen her in the company of Everett Utter's brother in the early part of 1948, but I don't remember seeing——

Q. All right. What was his brother's name?

A. Lish, they call him.

(Deposition of C. H. Strowbridge.)

Q. You have seen her in the company of Lish Utter? A. Yes.

Q. On a date with him as far as appearances were concerned; is that right?

A. Oh, they just meet up; I can't say he had a date with her.

Q. Actually you have seen her out with a number of different men, have you not, during the fall and winter of 1947-1948; is that not true?

A. I have seen her out with one man in the fall of 1947 because I was with him. [88]

Q. His name, as you have mentioned, is Russell McKenzie?

A. Russell McKenzie, that's right.

Q. Is that the only man you have seen her with in the fall of 1947?

A. That's the only one I can really say had her out.

Q. Russell McKenzie is the only one you can really say had her out in the fall of 1947 to your knowledge?

A. I've seen her stand and talk in the tavern to different men, but to be along with her, I was out with her when Russell McKenzie had her out and that's all.

Q. She has been in your place of business many, many times and danced and drank with your customers, is that not true, that you have observed?

A. At times.

Q. And that was done in the fall of 1947, the summer of 1947, is that not true?

(Deposition of C. H. Strowbridge.)

A. Well, she come there in July, 1947, when I was first starting to build the tavern.

Q. When was it opened?

A. Armistice Day.

Q. In November? A. Right.

Q. Then, you weren't operating prior to that, is that right?

A. The old tavern was running, but I wasn't running it. [89]

Q. Were you in there off and on?

A. I was in there off and on working on this new tavern.

Q. And you saw Eunice in there?

A. Yes. Russell McKenzie was helping build the new one, that's why he was around there a great deal. He was the carpenter there, that's why he was around there until it was finished.

Q. Were there occasions when you asked Eunice to come over from the house to help entertain your customers in a business way and she would come over to the tavern, is that not true?

A. Oh, I might have asked her to come over to the tavern, but I don't remember telling her to come over to entertain anybody.

Q. As a matter of fact, have you not on occasions asked girls from the city of Bemidji to come out to your place to furnish company for guests at your tavern, is that not true?

A. No, I don't believe I ever asked them to come out there for that reason. I have given a few of them a ride out there at different times, but I never

(Deposition of C. H. Strowbridge.)

walked right up to anybody and said, "Come out to my tavern to entertain customers."

Mr. Landoe: I think that is all. [90]

ROBERT HILTZ

called and sworn as a witness in behalf of the plaintiff, testified:

Direct Examination

By Mr. Lanier: [102]

Q. Do you know Ray Koenig?

A. Yes, I do.

Q. Plaintiff in this lawsuit? A. Yes, I do.

Q. Do you know his former wife, the present Mrs. Corcoran? A. Yes.

Q. How long have you known her?

A. Oh, probably 10 or 12 years, probably 12 years.

Q. Do you know the defendant, Corcoran?

A. Yes, I do.

Q. Can you tell me approximately when you first came to know who he was?

A. Well, I can't tell you the exact date.

Q. Well, approximately when?

A. It must have been around the fall of 1947.

Q. In the fall of 1947. Do you recall when the new tavern opened up there on Armistice Day?

A. Yes, I remember when that opened.

Q. 1947? [105] A. Yes.

(Deposition of Robert Hiltz.)

Q. Was it not about that time that you first came to know who he was?

A. Well, I think I had seen him a few days before, but the new place was where I got to know him.

Q. Did you ever see him in the company of Mrs. Koenig in the fall of 1947? A. Yes, I did.

Q. Where? A. At the tavern.

Q. At any other places?

A. No, that was about the only place I was at.

Q. Was at the tavern? A. Yes, sir.

Q. You saw him there in her company. Do you mean by that that they were together and having beer together and things of that kind?

A. That's right.

Q. Did you during the fall of 1947 see her in the residence that has been described here by Mr. Strowbridge near the tavern? A. Yes, I did.

Q. Did you ever during that fall see her in that residence with Mr. Corcoran?

A. No, I can't say I did. [106]

Q. Did you or not in the winter of 1948 see her there?

A. Yes, in the spring, I was around there often.

Q. You say the spring. Were you there in January or February, 1948?

A. No, I wasn't. I was there, but I didn't stay there as often.

Q. Were you there during January or February, 1948, and see Mr. Corcoran, the defendant, and Mrs. Koenig, the wife of Ray Koenig, together?

(Deposition of Robert Hiltz.)

A. Yes, I did.

Q. And where would you see them together?

A. Well, it was usually right near the place, either in the tavern or in the yard.

Q. Do you know whether or not Mr. Corcoran had an automobile during that time?

A. Yes, I do; he did.

Q. Do you know what kind of a car it was?

A. Yes, he had a Chevvie.

Q. Did you ever see her in the car?

A. Yes, I did.

Q. Did you see them in the car frequently or infrequently?

A. I can't say I seen him in the car frequently. I seen him in the car in the yard often.

Q. But you have seen them in the car? [107]

A. Yes, I have.

Q. Have you ever seen them together at any other night clubs besides that night club?

A. I never went to any others.

Q. You never went to the other clubs. Now, after April the third, or early part of April, state whether or not you saw Corcoran around the house there with Mrs. Koenig then?

A. I don't remember.

Q. Now, you don't remember that March and April period, do you?

A. I don't remember seeing them around the house.

Q. Did you see them around the tavern?

(Deposition of Robert Hiltz.)

A. Yes, I have seen them in the tavern.

Q. State whether or not he was there frequently or infrequently during that period.

A. Well, I won't say he was in the tavern, but often I seen his car in the yard.

Q. In the yard outside the tavern?

A. That's right.

Q. You would see them then together?

A. That's right. [108]

* * *

Q. Mr. Hiltz, where do you live?

A. Right now I'm staying in Bemidji part of the time, I live west of town five miles.

Q. In 1947, where were you living?

A. I was living five miles west of town, past the Dutch.

Q. Did you ever live in Clarence Strowbridge's home?

A. Well, I stayed in his home, yes. [109]

Q. When was that?

A. Well, I'd say the last 11 years I've been there nights.

Q. Well, are you staying there now?

A. No, I'm not staying there now.

Q. I mean, when did you last reside there?

A. It's never been my home, I've stayed there off and on. I had to go by there on my way home nights and I'd stop and stay there with him and I still do that today.

Q. That is what I am asking you, do you stay

(Deposition of Robert Hiltz.)

there now? A. That's right, once in a while.

Q. What do you mean by once in a while?

A. Whenever I get out there nights and they close up and I got nothing to do, I stay there over night.

Q. When did you last stay with him?

A. Oh, probably I suppose about a week ago Saturday, I suppose.

Q. A week ago Saturday night, you said you stayed there, "I suppose." Did you stay there then?

A. I think it was. I stay there quite often; I don't remember the exact days; I don't keep track where I stay nights all the time, why should I?

Q. Do you stay there several nights a week?

A. No, not no more; I used to.

Q. Did you stay there several nights a week in 1947? [110] A. No, I didn't.

Q. In 1948? A. Yes, in 1948, I did.

Q. And about a week ago you stayed there with him. Is he a special friend of yours?

A. Yes, that's right.

Q. Are you married? A. No.

Q. How old are you? A. Thirty-three.

Q. Have you been married?

A. No, can't find nothing.

Q. How long have you known Eunice? That is while she was Eunice Koenig?

A. I think I met her about the same time Slats met his wife. Probably 12 years ago I met them, the two sisters, I might have. She was pretty young then, 13 years ago, probably.

(Deposition of Robert Hiltz.)

Q. You met her about 13 years ago?

A. Yes, probably around that.

Q. Where did you meet her?

A. Well, I can't tell you the house. I met her with Slats. I used to run around with him when he was going with his girl friend. I met the rest of the family.

Q. Who was going with his girl friend? [111]

A. Mr. Strowbridge, the guy that was on the stand a minute ago here.

Q. I believe you testified you saw Eunice in 1948? A. That's right.

Q. Did you see her in 1947?

A. That's right.

Q. But you never went anywhere except to the Dutch Tavern, I believe you said?

A. That's about all. I went to shows and around town, certainly, but as far as night clubs, no.

Q. You have seen Eunice in the night club, the Dutchess, in 1948? A. That's right.

Q. What was she doing?

A. Well, I suppose the same as anybody.

Q. What would that be?

A. What's it for?

Q. What would that be?

A. That's to drink beer, I suppose.

Q. Well, now, do you know what it is for?

A. And dance. Yes, that's what I used to go there for, to drink beer.

Q. And what else?

A. Isn't that enough? I don't dance.

(Deposition of Robert Hiltz.)

Q. Well, that isn't the question. [112]

A. I don't dance.

Q. Don't you ever drink any hard liquor?

A. If I got some, yes.

Q. Have you drunk hard liquor in there?

A. I have.

Q. Of course, I am referring now to Eunice, what was she doing in there when you saw her there? Was she drinking beer?

A. That's right.

Q. Was she drinking hard liquor?

A. Can't say, I didn't keep an eye on her that close.

Q. I didn't get the last part of your answer.

A. I say I don't keep an eye on the women that close, they don't bother me that much.

Q. You don't pay any attention to the women?

A. Yes, that's right.

Q. Does that refer to Eunice, too, you didn't pay much attention to what she was doing?

A. That's right.

Q. Well, then, do you know what she was doing in the Dutch Tavern when you saw her in there?

A. I've seen her around once in a while, a guy can't help seeing what's going on once in a while, can he?

Q. Did you see others with her?

A. Yes, I have. [113]

Q. Men? A. Why, certainly.

Q. Various and different men at different times?

I am speaking now of the winter of 1948.

(Deposition of Robert Hiltz.)

A. What do you mean by that?

Q. Well, I mean what I say, did you see her with different men in there?

A. It's only natural.

Q. Well, did you see it?

A. Yes, when you're in a tavern you're going to be with different people.

Q. Well, I mean with her, was she drinking with different men? A. I can't say.

Q. Do you know whether on any of these occasions that you saw here there she had a date with anybody? A. No, I cannot.

Q. All you know is that you saw her there, is that it? A. Yes, I have saw her there.

Mr. Landoe: That is all. [114]

* * *

“Roland F. Suckert, called and sworn as a witness in behalf of the plaintiff, testified:

Direct Examination

By Mr. Lanier:

* * *

Q. And where did you stay at that time?

A. I stayed in the house, in the residence.

Q. That is the residence that has been described here by Mr. Strowbridge? A. Yes.

Q. What room there did you occupy in that place?

A. Well, whenever his wife was home, I slept upstairs and when she wasn't I slept with him.

(Deposition of Roland F. Suckert.)

Q. You slept with Mr. Strowbridge?

A. Yes.

Q. Now, do you know Mrs. Corcoran, the former Mrs. Koenig? A. Yes.

Q. During the time you were there beginning with February 1st, 1948, state whether or not she, Mrs. Koenig at that time, was there? A. Yes.

Q. Do you know this man, Mr. Corcoran, the defendant in [116] this case?

A. Yes, I know him.

Q. When did you first come to know who he was?

A. Well, when I first come there, I heard about him all the time. It was sometime before I met him socially—I mean, introduced.

Q. Well, did you meet him sometime in the early part of February or latter part of February, or when?

A. Probably the latter part of February, thereabouts.

Q. The latter part of February. And state whether or not you have seen him and Mrs. Koenig together as of that date?

A. Yes, I have seen them together.

Q. State whether or not you saw them in an automobile, Mr. Corcoran's? A. Yes, I have.

Q. And where would that be in this automoblie?

A. They would park out there until she [117] got ready to go in.

Q. And by out there, you mean——

(Deposition of Roland F. Suckert.)

A. Out in the yard.

Q. Near the tavern?

A. Well, between the tavern and the house, just in the yard there.

Q. Did that occur frequently or infrequently?

A. Frequently.

Q. And what time, do you know, they would usually park there?

A. Oh, it varied, but I remember they usually did close to closing-up, about 1:30 or so, or go into town and we would come back and it would be anywhere from two to four in the morning and that was quite a few times they was out there then yet. I didn't know when they would come in.

Q. After you would close up and go to town, what did you do that for?

A. To go in to get something to eat.

Q. That is, the force that worked at the tavern did that? A. Yes.

Q. And when you would come back you would see them [118] sometimes, they would still be there, is that it? A. Yes.

Q. During the time you were there, Mrs. Koenig slept in the house, the same place that you did, did she? A. Yes.

Q. Which room did she occupy there, upstairs or downstairs? A. Upstairs.

Q. State whether or not during that period that you were there, in February or March, you came in there and saw both of them in the cottage, did you see that?

(Deposition of Roland F. Suckert.)

A. Well, that was in the residence, in the house there I seen them.

Q. I am talking about in the residence.

A. Yes, I seen them.

Q. About what time of night did you come in?

A. Oh, I have come in there after I closed up and the boss is gone.

Q. In other words, Mr. Strowbridge wasn't there? A. No.

Q. Was that after his wife had left?

A. Gosh, I can't say.

Q. Was she there on this particular night I am asking you about?

A. No, his wife wasn't there [119]

Q. Mr. Strowbridge wasn't there? A. No.

Q. Well, when you came in, who did you find there? A. I found Eunice and Corcoran.

Q. And what were they doing?

A. Well, they were just laying on the bed.

Q. The bed or davenette?

A. I would say both places.

Q. You say you saw them on the bed; was that upstairs or downstairs? A. Downstairs.

Q. And what were they doing, what did they say to you or what did you say to them?

A. I asked them what they was doing, and they said, "You go upstairs and sleep" because I was sleeping downstairs.

Q. They were in the bed you usually occupied?

A. That's right.

Mr. Lanier: You may cross-examine.

(Deposition of Roland F. Suckert.)

Mr. Landoe (Reading): Cross-examination by Mr. Landoe:

Q. This first time you saw Don Corcoran was in the latter part of February, 1948?

A. It was thereabouts.

Q. Could it have been March?

A. Possibly. [120]

Q. Could it have been April?

A. No, no, it was before that.

Q. Either February or March, 1948, is that correct? A. Yes, it was in there some place.

Q. Where were you living at that time?

A. Strowbridge's residence.

Q. What was your occupation?

A. Oh, I was just cleaning up around there and waiting tables.

Q. Whereabouts? A. In the tavern.

Q. In the Dutchess Tavern?

A. That's right.

Q. Is that the place that was run by Clarence Strowbridge?

A. Well, he was the boss, he didn't have the license.

Q. But the place he operated nevertheless, is that correct? A. Yes.

Q. How long did you work out there?

A. Oh, off and on for about five years; not quite that long, I guess, it has been since 1948.

Q. Well, you worked out there for at least five years, haven't you? A. Thereabouts, yes.

(Deposition of Roland F. Suckert.)

Q. In 1948, how old were you? [121]

A. I was 18, I guess, or 19.

Q. How old are you now? A. 22.

Q. When was your birthday?

A. March 10th.

Q. You were 22 on the 10th of March——

A. Yes.

Q. Of 1950, is that it?

A. Yes, 1950. I'll be 23 now in a few more days.

Q. You started working out there for Clarence when you were about 16 years old, isn't that true?

A. No, it's not. [122]

* * *

RAY P. KOENIG

the plaintiff, called as a witness on his own behalf,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Lanier: [139]

* * *

Q. During all of this time, did you have affection and love for your wife? A. Yes, I did.

Q. Was there every indication she had the same for you? A. She did. [149]

* * *

Q. During the period from July, 1947, and coming down now to November of 1947, state whether or not your wife did visit you on week ends?

A. Yes, she did.

Q. At Brainerd? A. Yes.

(Testimony of Ray P. Koenig.)

Q. When she did, where did you stay?

A. Ransord Hotel, I had a room there.

Q. State whether or not you would alternate with her on visits, and visit her at Bemidji on week ends? A. Yes.

Q. State where she was staying at Bemidji at that time?

A. She was staying with her sister, Mrs. Strowbridge.

Q. Mrs. Strowbridge, her sister? A. Yes.

Q. During all this period of time, state whether or not you were supporting her?

A. Yes, I was.

Q. How much were you giving her?

A. Approximately \$80 a month.

Q. She was staying with her sister?

A. That's right.

Q. Did she have any expenses at her sister's home that you know of? [150]

A. I don't know.

Q. You alternated, she would either come to Brainerd, or you would go to Bemidji on week ends? A. Yes, sir.

Q. Right here, before I forget it, during this time, say the last five-year period, how many days off have you had from work? A. Not over 10.

Q. In the last five years? A. That's right.

Q. What are you doing now?

A. I am service manager for W. W. Walwark, Fargo.

(Testimony of Ray P. Koenig.)

Q. Do you know what the magnitude of that firm is with regard to the Ford setup?

A. The largest Ford dealer in the Northwest.

Q. They have offices where?

A. Moorehead and two offices in Fargo.

Q. What are your duties?

A. Supervising shop operations and personnel.

Q. How many men have you?

A. Approximately 20 or 21.

Q. Now, we have got over to November, 1947.

In November, 1947, did this visitation between you and your wife between Brainerd and Bemidji continue? A. Yes, it did. [151]

Q. Now, at that time, say the latter part of November, did you or not notice any difference in the relationship of your wife to you?

A. Yes, I did.

Q. What was that difference?

A. Sort of a cooling effect, you might say.

Q. How did it evidence itself on her part?

A. Well, that is hard to explain. She didn't act the same towards me.

Q. Did she have any reasons why she didn't?

A. Not that I knew of.

Q. Did she say anything about why she didn't?

A. No, she didn't.

Q. Did you continue to make your visits from the latter part of November, on up until Christmas Eve; did you continue to make weekly visits or she make weekly visits to you at Brainerd?

A. Yes, she did.

(Testimony of Ray P. Koenig.)

Q. State whether or not you were in Bemidji with her on Chirstmas Eve night?

A. Yes, I was.

Q. Where?

A. At the Strowbridge residence.

Q. Who was there that night?

A. Mr. Strowbridge, Marian, Jackie, their son, my wife, [152] Eunice, myself, and my boy, Terry.

Q. That was in 1947? A. That's right.

Q. What, in preparation for that visit, did you do with respect to obtaining Christmas presents?

A. I bought some gifts.

Q. For whom?

A. For my wife and child.

Q. What did you buy for your wife?

A. I believe it was a robe set, a pajama and robe set and a pair of stadium boots.

Q. Did you get some things for the boy?

A. Yes, a sled.

Q. At that time, were those presents given away that night? A. That's right.

Q. After that, what happened among you people?

A. After the gifts were opened and the children played with them, and afterwards, they went to bed. Mr. Strowbridge went to midnight Mass, and, therefore, left I and my wife alone.

Q. Then, was anything said by her with regard to her affections for you?

A. She told me at that time she no longer loved me.

(Testimony of Ray P. Koenig.)

Q. Was that or not the first time she had ever told you that? A. That is correct. [153]

Q. Then, after that you went back to Brainerd?

A. That's right.

Q. Then, when did you next see your wife?

A. Sometime in January.

Q. Where? A. At Bemidji.

Q. Did she come to Brainerd any more?

A. Yes, she did.

Q. Week ends? A. That's right.

Q. Did she bring up this subject any more?

A. Sometimes, yes.

Q. Now, in January, when you saw her there, was something said there at that time in regard to this matter?

A. She wasn't sure as to whether or not she wanted a divorce.

Q. She discussed the matter of divorce?

A. That's right.

Q. Now, during this time from that Christmas Eve on, were you supporting her?

A. Yes, I was.

Q. And with regard to your affections for your wife, were they still alive in you? A. Yes.

Q. Did you still want a home with her presiding over it? [154] A. That's right.

Q. Were you still capable and able of taking her home and taking care of her?

A. That's right.

Q. In May, 1948, a divorce was granted?

A. That's right, sir.

(Testimony of Ray P. Koenig.)

Q. Now, after that divorce, state whether or not you learned for the first time of her relationship and association with the defendant?

A. Shortly after the divorce was granted, I learned that.

Q. Before that, had you learned anything about it? A. No, sir, I hadn't.

Q. Had you ever seen him to your knowledge before that? A. No, sir.

Q. During this period of separation on account of the housing situation, had you felt that everything was all right and regular?

A. That's right.

Q. What year did you go into the army?

A. 1942, August.

Q. August. Now, do you know whether or not your wife subsequent to that divorce married the defendant? A. Yes, she has.

Q. And is his wife now?

A. That's right. [155]

* * *

Cross-Examination

By Mr. Landoe: [156]

* * *

Q. By whom were you married?

A. A Judge Oliver.

Q. What kind of a Judge was he?

A. He is District Judge, I believe.

Q. Wasn't he a Justice of the Peace?

(Testimony of Ray P. Koenig.)

A. No, I don't think so.

Q. Now, at that time, on that day, how long had it been prior to that that you had decided to get married?

A. February 25, I believe.

Q. You didn't have any engagement, I don't suppose?

A. No.

Q. You didn't announce your marriage to anyone?

A. No, sir.

Q. Do you know what the waiting period in the State of Minnesota was at that time before you could get married after you applied for the license?

Mr. Lanier: Objected to as irrelevant and immaterial.

Mr. Landoe: It is preliminary to other testimony.

Mr. Lanier: Unless they challenge the marriage.

The Court: What difference does it make?

Mr. Landoe: I would like to go into it to show the relationship existing at that time as well as all subsequent times. [157]

The Court: I don't see (interrupted).

Mr. Landoe: Counsel has asked what the relations were from the time they were married.

The Court: From the time they were married. Let's go into that.

Q. (By Mr. Landoe): Was this marriage, then, something in the nature of a secret marriage?

A. Somewhat, yes.

Q. Where were you living at the time you were married?

A. Living with my father in Bemidji.

(Testimony of Ray P. Koenig.)

Q. As a matter of fact, weren't you living with Eunice's sister's husband, Clarence Strowbridge?

A. When I got married?

Q. Yes. A. No, sir.

Q. Where did you live after you got married?

A. With my father part of the time, and also with Clarence Strowbridge.

Q. You said you left on a trip. When was that?

A. I believe it was in April.

Q. What part of April?

A. That I don't remember.

Q. Could it have been about the 5th of April, 1942?

A. It could have been, or it could have been the 15th, I don't remember. [158]

Q. Anyway, it was about a month after you were married? A. I think so.

Q. During that month, did you live part of the time with Clarence Strowbridge? A. Yes.

Q. How much of that time did you live there?

A. That is hard to say, it has been a long time ago.

Q. But you lived there for several days at that time? A. Possibly, yes, sir.

Q. Where was Eunice living at the time you married her?

A. With her sister, Marian, I believe.

Q. Marian Strowbridge? A. That's right.

Q. You hadn't been going with her, you didn't consider her as your steady girl friend up until a week before you married her? A. Yes, I did.

(Testimony of Ray P. Koenig.)

Q. You were going with various girls up until a week before you got married?

A. No, sir, I didn't.

Q. You were practically engaged to a girl by the name of Evelyn Monkman?

Mr. Lanier: It is immaterial; not throwing any light on any issue material in this case.

The Court: I will overrule the objection. You established a [159] sweetheart situation from the time he was a young boy. We will find out about it as long as you brought it in.

Q. As a matter of fact, state whether or not it is true, Mr. Koenig, that you were out all night with Evelyn Monkman six days after you were married to Eunice? A. No, that is not true.

Q. And that you spent that night in a garage in the City of Bemidji?

A. That is not true.

Mr. Lanier: Just a minute, if the Court please, object to that line of examination as immaterial and move to strike all that testimony going into the question of whether he spent a night out with a woman during that period as too remote.

The Court: Do you want to make an argument, do you really question those?

Mr. Lanier: That is my position.

(Jury admonished and left courtroom.)

The Court: On what ground do you say this is immaterial?

Mr. Lanier: It is an attempt to show an im-

(Testimony of Ray P. Koenig.)

proper relationship on his part with another person, another woman, at a time that is remote from this case, because the evidence is so far that they lived together as husband and wife in happiness for many, many years.

The Court: That is the very point of the thing; you established the many, many years; you went from the beginning of the [160] marriage into the marriage relationship. Of course, it is competent and material to show what that relationship was and whether or not the acts of the plaintiff himself were the cause of any alienation of affections. Isn't that so, isn't that admissible, isn't that material?

Mr. Lanier: I take it, if the Court please, it is highly remote, it is going back many years preceding the time during which they lived together happily.

The Court: You say it is happily. Now we are going to find out. Isn't that the point of the thing?

Mr. Lanier: I take it, if the Court please, at no time in the examination did I go into improper conduct of his wife or himself.

The Court: No, you said there wasn't any.

Mr. Lanier: My objection is this is remote, immaterial and not proper cross-examination.

The Court: Of course, if it is a single instance, I might agree with you. Are you going to show a course of conduct?

Mr. Landoe: No, the entire marriage period.

(Testimony of Ray P. Koenig.)

The Court: You are going to show a course of conduct?

Mr. Landoe: Yes.

The Court: Very well, the objection is overruled. Call the jury back in.

(Jury returns to courtroom.)

Q. (By Mr. Landoe): Now, I will ask you, Ray, when it was [161] that you went into the service, I know you testified to it?

A. I was sworn in August 18th. I left for Fort Snelling September 1st.

Q. 1942? A. That's right, sir.

Q. And you were mustered out of the army on what date? A. October 29, 1945.

Q. October—again the date, please?

A. 29th, 1945.

Q. And the time Eunice left Brainerd to go up to Bemidji was what date?

A. July 1, 1947.

Q. The period of time that you and Eunice, your wife, lived together from the time you were married on March 8, 1942, would be approximately two years, isn't that correct?

A. No, it is more than that.

Q. That you actually lived together in the same abode?

A. No. We lived together probably six months before I went into the service, isn't that right?

Q. Yes.

(Testimony of Ray P. Koenig.)

A. And from November, 1945, until July 1, 1947.

Q. About 26 months altogether. Now, you say you went to Longview, Washington, in the forepart of April, 1942?

A. Sometime, I believe it was in April.

Q. How did you travel? [162]

A. I had an automobile.

Q. Who went on this trip?

A. My wife and a fellow by the name of Donald Schwartz.

Q. Who was Donald Schwartz?

A. A young fellow that lived in Bemidji.

Q. Was he a pal of yours?

A. I would say he was a friend.

Q. Who else went on this trip?

A. That is all.

Q. Didn't Eunice go?

A. Yes, I said my wife.

Q. I beg your pardon. And you went to Longview, Washington? A. That's right.

Q. You left Washington what month?

A. Sometime in June, I believe; it could have been July, I don't remember.

Q. In the month of May, did your wife have any illness in the State of Washington?

A. Yes, sir.

Q. What was the cause of the illness?

A. She had a miscarriage, sir.

Q. Did she go to the hospital?

A. Yes, sir.

(Testimony of Ray P. Koenig.)

Q. Was she quite sick?

A. Yes, very sick. [163]

Q. She had a doctor in attendance?

A. That's right.

Q. And that was approximately in the month of May, 1942?

A. Yes, sir, I think so.

Q. When you returned from Washington, which route did you travel?

A. The highway number?

Q. Did you go through the State of Idaho on your way back to Minnesota?

A. Yes, sir.

Q. Did you stop in a little town called Kamiah, Idaho?

A. Yes, sir.

Q. Whom did you visit in Kamiah, Idaho?

A. A cousin of mine.

Q. What was his name?

A. Ray Tier.

Q. Who was with you at that time?

A. The same fellow that went out with us.

Q. Don Schwartz?

A. That's right.

Q. And your wife, Eunice?

A. That's right.

Q. Do you know a little town that is called Orofino?

A. Yes, sir.

Q. How far is it located from Kamiah? [164]

A. 20 miles, maybe.

Q. Do you recall the date you came into Kamiah, Idaho?

A. No, I don't.

Q. The month?

A. Possibly June.

(Testimony of Ray P. Koenig.)

Q. June, 1942? A. I believe so.

Q. How long were you in the State of Idaho?

A. Two days, I believe.

Q. State whether or not it is true that on your second night in the town of Orofino, Idaho, your wife caught you in a house of prostitution?

A. That is true in one extent.

Q. Were you there? A. That's right.

Q. Did your wife see you there?

A. That's right.

Q. Did she take her bags out of your car and leave you at that time? A. No, she didn't.

Q. Or try to leave you? A. No.

Q. Do you recall the occasion?

A. Yes, I do.

Q. State whether or not it is true that when your wife caught [165] you in this house of prostitution that you left her and got in your car and drove away from her and drove down to a beer tavern?

Mr. Sutton: Object to that; it has already been answered.

The Court: Overruled.

A. She didn't go with me.

Q. She didn't go with you?

A. That's right.

Q. Did you go to a beer tavern?

A. I drove to a night club.

Q. Did your wife follow you in another car?

A. That's right.

(Testimony of Ray P. Koenig.)

Q. Did she approach you and tell you she wanted her suitcases? A. I don't believe so.

Q. As a matter of fact, state whether it is true that you got her suitcases and threw them at her in the road? A. No, sir.

Q. Is it true she got her suitcases and proceeded walking down the highway?

A. She did not take any suitcase.

Q. Is it true you drove down the highway and forced her to get in the car?

A. I didn't force her; I asked her. [166]

Q. I'll ask you whether or not she was laying in the highway at the time you picked her up?

A. No, she was standing on the highway when I picked her up.

Q. When did you get back to the City of Bemidji on this trip? A. Sometime in June.

Q. Sometime in the first part of June or the latter part of June? A. I don't remember.

Q. Could it have been in the last week of June, 1942?

A. It could have been, or it could have been the first.

Q. Now, let's get it as near as you can remember. A. That is as near as I can recall.

Q. It could have been the first part of June or the last part of June?

A. That's right, 1942, nine years ago.

Q. Did you take another trip after that to the State of Washington, the same summer?

(Testimony of Ray P. Koenig.)

A. That's right.

Q. The same summer you were married?

A. That's right.

Q. How long after you got back from the first trip did you take the second trip to the State of Washington.

A. In August, I believe, wasn't it?

Q. I don't know. Is that correct? The first part of [167] August or the last part of August?

A. It must have been the first part.

Q. You don't recall, but you did take another trip? A. That's right.

Q. Who went with you?

A. Mr. Strowbridge and a fellow by the name of Ted Hiltz.

Q. Who is Strowbridge married to?

A. Eunice's sister, Marian.

Q. Clarence Strowbridge, he is the party who was married to Eunice's sister. They are now divorced, are they not? A. That's right.

Q. The other boy's name was Ted Hiltz?

A. That's right.

Q. Did your wife go on that trip?

A. No.

Q. Just you three fellows?

A. That's right.

Q. You say that was in the month of August, 1942? A. Yes.

Q. Where did you go?

A. We went to Longview, Washington.

(Testimony of Ray P. Koenig.)

Q. Prior to the time you took this trip, state whether or not it is true that on one occasion after you arrived back in Bemidji, late at night, you, in the company of Donald Schwartz and one other male person, had a date with three women in [168] an automobile; that you went into the house of Clarence Strowbridge where Eunice was then staying, your wife, to get your coat, and that she started to ask you where you were going, and you locked her in a room and turned the lock on the door? A. No, sir.

Q. That her sister released her, and she came out and saw you in the car with three women?

A. That is an absolute untruth if I ever heard one.

Q. That never happened? A. No, sir.

Q. I'll ask you whether or not on that occasion you had a date with a girl by the name of Shirley Peterson? A. I don't know her.

Mr. Sutton: Object to this examination, the questions are coming too fast.

The Court: The witness doesn't seem to be having any trouble, Mr. Sutton.

Mr. Sutton: The questions are interposed before the answer comes out.

The Court: Proceed.

Q. You don't know a girl by the name of Shirley Peterson?

A. No girl by the name of Shirley, but I know

(Testimony of Ray P. Koenig.)

a girl by the name of Jerry Peterson that could be the one you are referring to.

Q. She could have been the girl? [169]

A. I have never been out with her, if that is what you are referring to.

Q. Now, then, on this trip you took with these two fellows, Clarence Strowbridge, and who was the other one? A. Ted Hiltz.

Q. Ted Hiltz is what relationship to—what is his brother's name?

A. Robert. He has several brothers, but (interrupted).

Q. Robert. State whether or not it is true during the time you were on this trip that you sent a postal card to two sisters whose names were June Keller and Betty Keller, and on this card that you said, or words to this effect: "It is mighty hot out here, but not near as hot as some stuff we know back in Bemidji. Love, Ray and Slat's"?

A. No, sir, I wrote that card for Ted Hiltz and Clarence Strowbridge.

Q. You wrote the card? A. That's right.

Q. You sent it to two girls called June Keller and Betty Keller, is that correct?

A. It is possible.

Q. You know it is true, and your wife saw that card?

A. It was in my handwriting; that is the reason why she thought I had something to do with it.

Q. Isn't it true that the signatures were placed

(Testimony of Ray P. Koenig.)

under the [170] stamp, at the right hand corner, and there was a note on the card to look under the stamp?

A. No, sir, not that I remember.

Q. June Keller was one of your girl friends, wasn't she?

A. I have never been out with June Keller in my life.

Q. Alice Stetten was one of your girl friends?

A. I have never been out with her; I can't even place the girl in fact.

Q. Would you recognize her more by the name of the Sheepherder?

A. No, sir, I have never taken her out in my life.

Q. You know who she was?

A. Yes, I do. In fact, my brother went with her is the only connection I ever had with her, my oldest brother, Clarence.

Q. I am referring now, when speaking of these girls, to the fall and spring of 1947.

A. 1947?

Q. I mean of 1942, I beg your pardon. I mean immediately after your marriage until after you went in the army.

A. That's right.

Q. Jackie Tell, did you go out with her?

A. No.

Q. Dorothy Teller?

A. Not when I was married.

Q. Kitty Nound? [171]

(Testimony of Ray P. Koenig.)

A. Never when I was married.

Q. I will ask you whether or not you recall an occasion, which you have denied, that you were out with three girl friends, the one of which you have referred to as Jerry Peterson, whether or not the following day you saw Eunice in the Dutchess Tavern about noon? A. Yes.

Q. In the month of August, 1942. Do you recall that occasion that I am speaking of?

A. I was in the tavern a lot.

Q. Do you recall an occasion when you came into the tavern about noon, when your wife, Eunice, was standing there with her sister, Marian, and there was present Donald Schwartz, and an iceman, a man who handles ice, and a bartender, during which you and your wife had an altercation, do you recall that? A. No, I don't.

Q. Now, I refer to a time that you came in there, and you saw her, and you walked up to her, struck her, and knocked her back under the tables?

A. That is not true.

Q. That is not true?

A. That's right.

Q. Do you recall whether or not there was such an occasion and Donald Schwartz brought her to and carried her into the house adjoining Clarence Strowbridge's. [172]

A. I slapped her because she called me a name that reflected on my mother that died about a year previously.

(Testimony of Ray P. Koenig.)

Q. So you do recall the occasion?

A. If that is the one you are speaking of.

Q. I am speaking of the occasion when you hit her with your fist and knocked her 15 feet and under some bar tables?

Mr. Sutton: Just a minute, that assumes a state of facts not in the record.

The Court: He is cross-examining the witness. Proceed. Objection overruled.

Q. That happened, is that true?

A. I never hit her with my fist in my life.

Q. What did you hit her with?

A. I slapped her. I cautioned her several times before, and she called me that name repeatedly.

Q. It is true you knocked her off her feet?

A. She never went off her feet.

Q. It is not true that Donald Schwartz had to bring her to and carry her into the house, is that correct?

A. No, sir, it is not.

Q. I will ask you whether or not it is true that a few days thereafter, a few days, and prior to the time you went into the service, and within a few days of the time you went into the service, that your wife, while you were present, tried to commit suicide [173]

A. No, sir.

Q. You don't recall that?

A. No, sir.

Q. I will ask you whether or not you were present on an occasion in the house of your brother-in-law then, Clarence Strowbridge, when your wife

(Testimony of Ray P. Koenig.)

went into the bathroom, and you were present, and took a bottle labeled "Poison, for External Use Only," and that you came in and your brother-in-law came in and found her laying on the floor of the bathroom?

A. Before I went in the Army?

Q. Yes. A. That is not true.

Q. That is not true? A. No, sir.

Q. Well, let's say several days before you went in the army? A. No, sir.

Q. And that at that time and place there was present her sister, Marian, and Donald Schwartz?

A. No, sir.

Q. And I will also ask you whether or not at that time she had informed you she had just found out she was pregnant?

A. No, sir, she didn't, no, sir. She told me about being pregnant, but never about taking any poison.

Q. When did she tell you about being pregnant? [174]

A. Shortly before I went in the army.

Q. You are not aware of the fact she tried to take her life? A. No, sir.

Q. Did you return after you entered the service on any furlough?

A. Yes, in November, I believe, I came home on furlough. I had been in the hospital; I got sick leave.

(Testimony of Ray P. Koenig.)

Q. You had been in the hospital in Virginia, is that correct?

A. That's right, she was out there with me.

Q. You had sent for her? A. Yes.

Q. Did you return on furlough in the latter part of March, 1943?

A. Latter part of March?

Q. Yes. A. No, sir.

Q. Did you return on furlough preceding the time your son was born, Terry? A. Yes, sir.

Q. When did you return?

A. I believe the last of February.

Q. The last of February, very well. When did you arrive in Bemidji?

A. The exact date I don't know, around the first of March.

Q. When was Terry born? [175]

A. March 8th.

Q. What was the date?

A. March 8th.

Q. Are you sure of that?

A. March 8th, yes, sir, either the 8th or 10th.

Q. Could it be April 10th?

A. Yes, when Terry was born was April 10th.

Q. April 10th, 1943?

A. Right. Then I came home the last of March.

Q. That is the time I am speaking of. Did you come home the latter part of March?

A. It must have been, yes.

Q. Where was your wife living at that time?

(Testimony of Ray P. Koenig.)

A. With my father.

Q. With your father? A. And sister.

Q. And your sister. Do you recall the time when your son was born, the day?

A. Yes, sir, April 10th.

Q. Now, I will ask you to take your mind back to the day before your son was born, on the 9th?

A. Yes.

Q. The 9th day of April, 1943. State whether or not it is true that you were out most of the night with a girl by the name of Veronica [176] Shadio? A. That is not true.

Q. Whose present name is Veronica Helopsik. You know her, do you not? A. Yes, I do.

Q. You say you were not out with her?

A. Not on the 9th.

Q. What day would you say it was?

A. I was never out with her. I had a drink with her on the 10th celebrating my being a father.

Q. That was the night your son was born.

A. He was born in the morning, I beg your pardon.

Q. In the morning of the 10th?

A. The 10th.

Q. But the night of the 10th you were out with her until daylight in the morning, as well as the night of the 9th. You were out with her two nights in a row? A. No, sir.

Q. I will ask you where your wife was on the night of the 9th of April, 1943?

(Testimony of Ray P. Koenig.)

A. She was home.

Q. State whether or not it isn't a fact that that night she went to visit her sister, Marian Strowbridge at her home adjoining the Dutchess Tavern, is that true?

A. No, she didn't.

Q. She wasn't there? [177]

A. The night before she went to the hospital, I am sorry, but she wasn't.

Q. The night before she went to the hospital?

A. That's right.

Q. How about the night before that?

A. I don't know about that.

Q. The night before she went to the hospital, would that be April 10?

A. No.

Q. That would be the night afterwards. I am speaking of April 9th.

A. She went to the hospital about ten o'clock of April 10th. Terry was born on the 10th.

Q. I am speaking of the 9th. Isn't it true she stayed with her sister, Marian Strowbridge, that night?

A. No, sir, she stayed at my father's home.

Q. And that you got in at six o'clock in the morning, and she was still waiting up for you?

A. No, sir.

Q. That is not true?

A. No, sir, not six o'clock in the morning.

Q. What time was it?

A. The previous night she told me to go out and see Marian and Slats because I had been sitting home all the time waiting for the baby to be born,

(Testimony of Ray P. Koenig.)

so I went out to the tavern that [178] night. There was no Veronica Shadio at all. In fact, I got in a fight because someone called my wife a dirty name and insulted the uniform I was wearing.

Q. Are you quite a fighting man?

A. No, sir.

Q. You get into fights quite frequently, don't you?

A. I have been in three my entire life.

Q. You have exercised yourself upon your wife quite frequently, isn't that true? A. Once.

Q. When did you return to the service, Ray?

A. The day after my child was born.

Q. The very next day after the child was born?

A. That's right.

Q. And the night of the day your child was born, you were drinking in the tavern, you say?

A. Right.

Q. What time did you get in that night?

A. I would say about two o'clock.

Q. You would say it would be closer to six o'clock in the morning, wouldn't you?

A. No, sir, I say two.

Q. And the night before, what were you doing the 9th of April, 1943?

A. I just told you. [179]

Q. Tell me again.

Mr. Sutton: Objected to as having been answered already.

The Court: Overruled.

(Testimony of Ray P. Koenig.)

A. I was out to the tavern. Marian was there, Mr. Strowbridge was there.

Q. Who else was there?

A. No one that I remember.

Q. Veronica Shadio was there?

A. She was not.

Q. You took her home, didn't you?

A. No, sir, I didn't.

Q. Now, then, did you return after you went back to the service on any further furloughs before you were mustered out of the army?

A. I had one furlough before I shipped overseas.

Q. State whether or not on that occasion you wired your wife and asked her for some money so you could come home? A. That's right.

Q. I will ask you whether or not she sent it to you? A. She did.

Q. Isn't it a fact she never even answered the wire? A. She did send money.

Q. Isn't it a fact that Clarence Strowbridge sent you the money? A. No, sir, she did. [180]

Q. You came back to the United States on what date? A. September 4th, I believe, 1945.

Q. 1945.

A. To New Wellington, Delaware, airfield.

Q. Where was your wife at that time?

A. Kingston, Tennessee.

Q. State again where you landed?

A. New Wellington, Delaware. That is an airport.

(Testimony of Ray P. Koenig.)

Q. That is on the Eastern seacoast of the United States, is it not? A. That's right, sir.

Q. When did you arrive in Bemidji, Minnesota?

A. On the 6th, I believe.

Mr. Lanier: If the Court please, just a minute. Upon all the grounds heretofore assigned, we object to this detailed examination; it is entirely far off the issues in this matter.

The Court: Overruled. Proceed.

Q. When did you arrive in Bemidji, Minnesota?

A. I believe it was the 6th.

Q. Of what month again? A. September.

Q. September, 1945? A. That's right, sir.

Q. Were was your wife during that time, do you know? [181]

A. She was in Bemidji, Minnesota, when I arrived there.

Q. She was in Bemidji, Minnesota. What was her physical condition?

A. She had been sick previous to that quite some time.

Q. What had caused her illness?

A. I don't know.

Q. Didn't you inquire?

A. She said something about getting sick in a war plant; she had been working.

Q. Where had she been working?

A. The atomic bomb plant at Oak Ridge, Tennessee.

Q. She had been working for what period?

(Testimony of Ray P. Koenig.)

A. I don't know how long. She never did tell me while I was overseas what she was doing. It was a military secret.

Q. State whether or not she returned to Oak Ridge, Tennessee, after you returned to Bemidji?

A. She got a leave of absence, she couldn't quit.

Q. She went back to Tennessee to go to work?

A. Yes, she couldn't quit.

Q. Just answer the question. Did she go back to Tennessee to go to work? A. Yes.

Q. When did she return to Bemidji?

A. In November.

Q. What year? [182] A. 1945.

Q. State whether or not on that occasion she had just sustained a severe physical accident to her arm? A. That's right, her left arm.

Q. Previous to her coming to Bemidji?

A. That's right.

Q. An accident she sustained after she went back to Tennessee, is that correct?

A. That's right, while I was in the service.

Q. Then she returned to the City of Bemidji. Where was her son Terry during this time, was he with her in Tennessee? A. Yes, sir.

Q. And for what period was she physically disabled, if you know, from this injury to her arm?

A. Her arm bothered her for a long time after that.

Q. Several months? A. I would say so.

Q. During which time she was unable to work, is that correct? A. Yes.

(Testimony of Ray P. Koenig.)

Q. And so she lived with you, is that right?

A. That's right.

Q. I believe you testified that until the early part of January, 1946, you were in Bemidji?

A. That's right. [183]

Q. Then you moved up to Brainerd?

A. Yes.

Q. Tell us where you lived there?

A. 312 Quincy Street.

Q. What was the nature of the habitation?

A. It was a small building, house.

Q. How many rooms? A. Two.

Q. How large rooms?

A. Probably 20 by 20, each of them.

Q. State whether or not it was a converted garage? A. I don't know that.

Q. In the rear of a residence?

A. That's right, it was in the rear of a residence.

Q. Which had formerly been used for a garage, but had been fixed up so as to be livable?

A. I don't know whether it was a garage or not.

Q. Who was your landlord?

A. Merle Dougherty.

Q. His wife's name is Alice Dougherty, is that correct? A. I think so.

Q. They have a daughter by the name of Nona Wilson, is that correct? A. Yes.

Q. You lived there from January 15th to what date? [184] A. July 1, 1946.

Q. During that period of time, state whether

(Testimony of Ray P. Koenig.)

or not you recall Eunice's sister, Arlene, visited at that place? A. Yes, I believe she did.

Q. Did she stay for a few days?

A. Probably a few weeks, I don't remember.

Q. You don't recall. And then on July 1st, do I understand you to say you moved from that place to a cottage on the lake? A. That's right.

Q. How many miles out of Brainerd was that located?

A. You mean from town, the city limits, or what?

Q. Just approximately how far out of town?

A. One mile.

Q. From the city limits?

A. Yes, and probably one and a half miles from the downtown area.

Q. A mile and a half from the downtown area. Describe that cottage.

A. It was a lake cottage, right on the edge of what is called Rice Lake. It was owned by Mr. Harold Yde.

Q. How many rooms in it?

A. A one-room affair. Everything was built in, with a sectional kitchen, living room, fireplace, dressing place, shower. [185]

Q. It was a one-room cottage?

A. That's right.

Q. By the way, what rental were you paying for the place you had over at Dougherty's?

A. I don't remember.

Q. Was it \$12 a month?

(Testimony of Ray P. Koenig.)

A. I think more than that.

Q. Was it \$15?

A. I think it was more than that.

Q. You don't recall exactly? A: No.

Q. What was the rental on the cabin you had over at the lake? A. \$35 a month.

Q. I will ask you whether or not during the period you lived over by the lake, your wife, Eunice, went to work and was working? A. Yes.

Q. Where did she work, if you recall?

A. She worked at the Rainsford Hotel, doing some bookkeeping work, records or something.

Q. Do you recall she had any other employment in addition to that?

A. Sometimes she worked part time at the Thrifty Drug Company. [186]

Q. She worked at least at the Drug Company, is that correct, and then she worked as bookkeeper at the Rainsford Hotel? A. Yes, sir.

Q. Did she work at one place or the other up until the time she left around the 1st of July, 1947?

A. She never worked steady at either place, I don't believe.

Q. But she worked as she was called?

A. She worked only when her sister Arlene was staying with us. I believe that was for a period of about nine months.

Q. When she had someone to look after the child, then she worked; is that correct?

A. That's right, that's correct.

(Testimony of Ray P. Koenig.)

Q. You said Mr. Yde was landlord of this cottage?
A. That is correct.

Q. He gave you notice to vacate, isn't that true?

A. That's right.

Q. There has been quite a bit of testimony here about the cottage being sold. Do you have any knowledge that the cottage was ever sold?

A. I don't think it was sold, but that is what he told me.

Q. That the cottage was sold when he gave you notice. He didn't want you there any more; isn't that true?
A. Possibly. [187]

* * *

DEFENDANT'S MOTION FOR ORDER DISMISSING ACTION

Mr. Landoe: At this time, if the Court please, defendant moves for an order dismissing the action now pending before this Court upon the ground that under all the facts and the law, the plaintiff has shown no right to relief.

Mr. Lanier: Is that the motion as made?

Mr. Landoe: Yes.

Mr. Lanier: The motion is resisted.

Mr. Landoe: The plaintiff, in his complaint, has set forth certain substantive ultimate facts in the way of pleading which the defendant contends were not sustained by the burden of proof sufficient to establish a *prima facie* case. The plaintiff has the burden of establishing that the affections of the spouse were actually alienated from the plaintiff

by the wrongful acts or conduct of the defendant, which the plaintiff has alleged in his complaint. He has the burden of establishing that the defendant had knowledge of the marital relationship between the plaintiff and his former wife, which ultimate fact the plaintiff has alleged in his complaint. There is no testimony, either direct or by inference or otherwise, in the record at this time that the defendant had any knowledge up to the time referred to in plaintiff's complaint, and as outlined in the theory of the plaintiff's cause of action submitted preliminary to the trial of this case, which theory is, and which alleges, that the alienations, or the affections were completely alienated at Christmas of [199] 1947. There is no testimony in the record that the defendant had any knowledge that the plaintiff and his wife, Eunice, were married as of that time. That is an academic and fundamental requirement of proof as outlined in 42 C.J.S., page 333, and is supported by the decisions pertaining to the requirements and burden of proof in cases of this character. In addition to that, in the case of *Pugsley vs. Smith*, 194 Pacific, page 692, which is an Oregon case, but carries with it the general principles that apply to the procedure to be followed in the trial of this case, and that to my knowledge there are only about three cases in the State of Montana pertaining to alienation of affections, and we have to look to other jurisdictions to get a further determination of the principles involved, in which case the Court held, "Stated broadly, the rule is that the third person's conduct

must have been the intentional cause of the loss suffered by the injured spouse." There isn't any evidence in the record thus far that the defendant is guilty of any conduct or acts that in anywise, directly or indirectly, touched upon the marital relations between the plaintiff and his wife as of the time alleged in the complaint, namely, Christmas time, 1947. There is no evidence to show that the defendant, either intentionally or otherwise, did anything to interfere with the marital relations. There is no testimony here of him having enticed her, of him having induced her, of having persuaded her to [200] get a divorce. There is not a scintilla of evidence that the defendant did anything to persuade, influence, or entice the wife of the plaintiff, and for those reasons we take the position that the plaintiff has failed to introduce evidence sufficient to make out a *prima facie* [201] case.

* * *

Mr. Lanier: May it please the Court, since adjournment and during recess, we have decided on another move to make in this lawsuit, and for the time being, in lieu of the application to reopen for the plaintiff, we desire to move the Court for leave to amend the pleadings to conform to the proof, pursuant to Rule 15, Federal Civil Rules, subsections (b) and (c), in this particular: To substitute for paragraph 5 the following:

AMENDMENT TO COMPLAINT TO
CONFORM TO EVIDENCE

Plaintiff charges that while plaintiff was happily married and supporting his said wife, defendant, in November, 1947, met her at or near Bemidji, Minnesota, and began regularly keeping company with her; that in February, 1948, he ascertained that she was married; that from the time [214] of meeting the said wife of plaintiff in November, 1947, he alienated her affections, and in February or March, 1948, after learning of said marriage, he continued to keep company with her and proceeded to carnally know her with knowledge of the fact she was married; that in pursuance of her loss of affections aforesaid, plaintiff's wife obtained a divorce from the plaintiff, and married the defendant. Our motion is to submit this amendment in lieu of paragraph V of the complaint, pursuant to Rule 15 of the Federal Rules of Civil Procedure, which we submit controls in the matter of amendments. [215]

* * *

ORDER ALLOWING AMENDMENT

The Court: I'll grant the motion to amend. [222]

* * *

The Court: Yes, but assuming the truth of all of your evidence, the fact remains, doesn't it, that there has to be proof that the defendant was the aggressor, isn't that so?

Mr. Sutton: If the Court please, very shortly here is a summarization of Kansas, Indiana, Massa-

chusetts, Missouri, Nebraska and New York cases laying down the general rule relating to the conduct of strangers to the marriage. "The law looks with suspicion upon the conduct of strangers in blood in interfering in the relations of husband and wife. His motives, whether malevolent or improper, are always a material [224] consideration. If he by advice or enticement induces a wife to leave her husband, or takes her away, with or without her consent, and encourages her to remain away from him, or harbors and protects her while away from him, he does these things at his peril."

The Court: Yes, yes, I understand that. You are not on the point. The point is, was it his action. I am not talking about that. Of course, the stranger is considered by the law in a different light than, for example, the parent. The proof has to be much stronger in the case of parents, when you show a parent's interference, than when you show a stranger interferes. It doesn't have to be as strong, but you have to show it is the stranger who interferes.

Mr. Lanier: If the Court please, I recognize it is the duty, under all laws, under the laws, both state and federal, and under the laws of God Almighty Himself, is that the duty of one man to another is to keep his hands off another man's wife as long as she is another man's wife.

The Court: Yes, but you have got to show he laid his hands on her, don't you? You can't let it rest in the situation in which nobody knows whether it was the wife or the defendant who was the aggressor.

Mr. Sutton: Then, it is proper for the jury to find out.

The Court: If you had direct evidence on the one hand that it was the defendant, and on the other hand that it was the [225] wife, it would then be for the jury, sure.

Mr. Sutton: Here you have evidence or purported evidence, which to me is merely witch hunting by Mr. Landoe on cross-examination, where name after name is brought in on cross-examination, where he is trying to show there were many men, but there is not one whit of evidence that anyone of these men did as much as kiss her, or sleep with her, or have close contact with her, but here is the man who took her to St. Paul, that is the evidence.

The Court: No, it is not the evidence. Now, Mr. Sutton, I know what the evidence was. I sat here, too. It is not in evidence that the defendant took her to St. Paul.

Mr. Sutton: He admitted it, sir.

The Court: He did not. Let's get the record straight, and let's not quibble about things and don't try to mislead the Court in quoting the evidence. I don't appreciate that sort of argument. I am trying to decide a very important thing to your client and to the defendant, and to the Court, and there is no evidence in the case that the defendant took the plaintiff's wife to St. Paul.

Mr. Sutton: I apologize if I haven't stated it correctly.

The Court: He was at St. Paul and he went to the basketball game with her. That is the evidence.

Mr. Lanier: As I construe the law in the matter,

briefly [226] it is this: That the plaintiff does not have to prove, as I get it right in this book, the plaintiff need not show that the defendant's conduct was the sole cause of his wife's leaving him.

The Court: That is fine, that is all right, but you still have to show that it was a contributing cause, his act, what he did. There is no evidence at all that upon any of their meetings—and what they did at their meetings is not in evidence, except on one occasion where he said they were laying on the bed.

Mr. Sutton: Didn't he marry her?

Mr. Lanier: And that was in the morning around one or two o'clock when they laid on the bed.

The Court: There is no evidence as to who else was present, if anyone else was present. I mean the whole case is so weak that it just is one of those matters, because of the general weakness of the case, it makes it difficult, I confess it makes it difficult for the Court to rule specifically, because I am so embarrassed by the general weakness of the matter. What I want to find out is where you have proved the defendant was the aggressor, and I think that that is a necessary element, is it not?

Mr. Lanier: I never have got the idea from any decisions or anything I have ever read that that term "aggressor" comes into the case. [227]

The Court: Necessarily he has to be the enticer to alienate her affections. Surely a man is not responsible if he walks into a room, and the woman looks at him, and the woman seeing him says, "That man is for me."

Mr. Lanier: It is the business of the man, when he knows the woman is married, to keep his hands off.

The Court: Yes, it is his responsibility to keep his hands off another's man's wife, that is true, but you have to prove he laid his hands on her, that is the point.

Mr. Sutton: You don't have to prove adultery, do you, Judge?

The Court: No, no.

Mr. Lanier: I can't conceive any man would appreciate having his wife in bed with another man with nobody around.

The Court: We have to make the inference against you. You don't prove the circumstances that were there at all. He said they were laying on the bed. Why don't you go forward to show what the circumstances were?

Mr. Lanier: We had reasons for not doing that, if the Court please.

The Court: You don't want me to then take the big jump to the fact "Why, of course, they were in an act of sexual intercourse." If you had reasons for not showing what they were actually doing, it is to be inferred that they were not doing anything improper. It is the proper inference for the Court [228] and jury to draw, isn't that the law?

Mr. Lanier: I can't agree with the Court.

The Court: Don't you understand that to be the law, that when you have evidence available and don't produce it, that the inference is against you?

Mr. Lanier: All he saw they were on the bed.

Naturally, if he stopped and watched them, there wouldn't be anything else happen.

The Court: You didn't have him testify what the circumstances were. The circumstances are to be inferred against you. I can't infer that they were undressed, can I?

Mr. Lanier: The testimony is they had clothes on. I don't think (interrupted).

The Court: Maybe it is, but I don't think there is any testimony on that point.

Mr. Lanier: I don't think there is any testimony they weren't there.

The Court: I can't, because they were laying on the bed or the davenette, I can't infer they were engaged in an act of intercourse, because if they were, your witness would have so testified. I can't infer they were doing anything improper at that time or else your witness would have so testified. Is that not the situation? Isn't that the situation of the law?

Mr. Lanier: Where the Court and I disagree is on the situation there with regard to the way they were at that time [229] of night. My viewpoint is that there is only one inference to be drawn from that situation at that time of night, just one.

Mr. Sutton: I believe there is a presumption under Montana law that adultery was committed. Further, under the Montana law, on a motion such as Mr. Landoe made, the Court will under any possible legal means try to strain and bring the fact issue before the jury, and allow the case to be de-

cided on its merits rather than a technical motion such as this.

The Court: It is not technical. It is just the law if there are not sufficient facts, the Court has to assume the responsibility in these cases.

Mr. Landoe: Counsel doesn't meant to say there is a presumption that a man is guilty of an illegal act.

Mr. Sutton: I am speaking of laying on the bed with a woman. There is a Montana presumption.

Mr. Landoe: I have never heard of any such presumption.

Mr. Sutton: Read your presumption tables in the back of the Code.

The Court: There is no presumption that a man committed a crime.

Mr. Sutton: I am not speaking of adultery in a criminal sense, in a civil case. I do wish to state that we would like to ask opposing counsel just what test of a prima facie case he [230] would expect to have in this matter here, just how far do we have to go?

The Court: That is simple. You have cited the cases which set up the requirements or the elements of an alienation of affections case. There must be wrongful conduct of the defendant, and you must prove alienation of affections of the wife, and the casual relation between the two, and there has to be evidence establishing that in order to submit it to the jury, from which the jury can find that. That is what you have to prove, and that is what I am faced with here. Where is the evidence of the casual

relationship between any wrongful acts of the defendant and the loss of the affections of the wife? Your own proof is that the affections of the wife were lost at least by Christmas, 1947. That is your proof.

Mr. Lanier: Through influences of this defendant.

The Court: No, there is no direct proof of that at all. Your other proof is that the defendant saw her once, may have seen her once in November, after November 11th, at a time when he didn't even know who she was, and then possibly met her and was introduced to her late in November. There is no proof, as I recall it, that he ever saw her in the month of December.

Mr. Sutton: In cross-examination he admitted he had seen her at the Dutchess the first times.

Mr. Lanier: That brings me back to the question of the renewal of our application to reopen plaintiff's case for the [231] purpose of putting on further proof at this time. We make such application.

The Court: The application is denied. Counsel is only entitled to reopen his case where an injustice would be done by not permitting him to. Counsel himself has stated that he, upon his own deliberations, decided not to present the evidence he now seeks the Court to let him prove. We could possibly be here the next six months if you rested your case after every witness you put on and then said, "Give me another crack at it, if that isn't sufficient." Why, of course, the Court can't be put in that position if you decide upon one strategy, and

then seeing it is failing, ask the Court to give you another chance to try a different strategy. That is not fair. The application is denied. I am going to consider the matter for another few minutes. Court will stand in recess. Advise the jury to remain in attendance.

(Thirty-minute recess.)

The Court: Call the jury.

(Jury returns to courtroom.)

The Court: Ladies and gentlemen of the jury, at the close of the plaintiff's case, the defendant moved the Court to dismiss the action because sufficient facts had not been proved to submit the case to the jury. The Court has considered the problem completely and fully, I believe, and the Court decides that sufficient facts have not been proved to entitle the case [232] to go to the jury for consideration. The situation is simply this: That in order for the plaintiff to be entitled to submit the case to the jury, he must prove what is known as a *prima facie* case, and the Court in considering that must consider and accept as true for the purpose of making the decision that all those things which the plaintiff proved, or evidence which he submitted is accepted by the Court as true for the purpose of deciding this problem, but, then, after considering all of the things that have been attempted to be established here as being true, then the Court must look at it from the legal standpoint and find out whether, under all those circumstances, if a

jury would be warranted in finding a verdict against the defendant. As I say, I have considered that completely. In a case of this kind, there are three main elements that have to be proved. Those elements are that the plaintiff has to prove the defendant's wrongful conduct, then he has to prove the alienation of the affections of his wife, and then he has to prove that the defendant's wrongful conduct caused the alienation of affections. Well, the proof here just didn't entitle a jury to believe that. The proof of the plaintiff himself was that the wife's affections were at least alienated upon Christmas Eve, at least by that date, when she so announced to him they were alienated and she didn't love him any more and wanted a divorce. That was his proof. The proof with reference to the defendant up to that time is just [233] practically that he had met the wife at that point. The proof is further he didn't know who she was at that time. There is no evidence from which the jury would find even that he knew she was a married woman, and the acts of the defendant that were proved were nothing from which I believe the jury would be warranted in finding that his acts were wrongful. Apparently he met her at a bar where she frequented, where she lived with the owner of the bar and worked there at times, helped out, and the defendant on occasion went to the bar and saw her there, and on very few occasions, at least prior to the time when her affections were proved by the plaintiff to have been alienated. You couldn't find from those facts that the defendant's

acts alienated her affections. There is just a complete failure of proof, and in my opinion, I don't think the jury would be warranted in finding that there was such proof. The whole matter comes down to that general, simple proposition that the defendant's conduct was not such as to alienate her affections at that point. It must be established in any event that his conduct was wrong, that his intention was to alienate her affections from the plaintiff, that that was his purpose, that he enticed her away from the plaintiff. Now, from all the circumstances of the case, the jury just couldn't believe that. The whole marriage relationship, the whole course of the marriage and the actions of the plaintiff are such that the jury would just be acting, if they acted in [234] favor of the plaintiff, would be acting out of some generosity or some other matter other than pure facts of the case. As I say, you have to find not only that the plaintiff engaged, or that the defendant engaged in wrongful conduct, and not only find her affections were alienated, but you have to find that his conduct was the cause, or, at least, a contributing cause of the alienation of the affections, and it just isn't in the evidence. A case of this kind is very difficult to prove. There is just no doubt about that. You have to depend upon, primarily in most cases, circumstantial evidence. You never can get right into the heart and mind of people and find out what went on there, motivated them, what their intentions and purposes were, so, as I say, a case of this kind is very difficult of proof, and it depends

ordinarily upon circumstantial evidence. Of course, circumstantial evidence in a case is just as good as any other kind, but there are certain rules of law that govern every kind of case. For example, when you prove circumstances, under certain circumstances, the jury is entitled to draw inferences. Now, for example, as I say, you have to prove in this case that the defendant's conduct was wrongful. Well, an attempt is made to prove that by showing they were together. Well, by showing they were together doesn't prove that the defendant's conduct or his intent was wrongful. It doesn't prove that he was the enticer or encourager or aggressor in the [235] matter at all. You see two people together. One or the other may be the aggressor, and it is just as reasonable to believe that the girl in the case was the aggressor under the facts given as the defendant in the case, so you are not entitled, under those kind of facts, to draw the inference that he was the aggressor, because it is just as reasonable to draw the inference she was the aggressor. The facts just don't build up to a case, which, as I say, establishes a *prima facie* case and requires the defendant to go upon his proof and submit the case to the jury. Under all the facts and circumstances of the case, there has been a failure of proof, and so the case, you are discharged from further consideration of the case, and the case is dismissed upon the motion of the defendant. [236]

State of Montana,
County of Silver Bow—ss.

I, John J. Parker, certify that I am the official court reporter in the District Court of the United States for the District of Montana; that I reported the trial of the cause of Ray P. Koenig, plaintiff, vs. Donald Corcoran, being Cause No. 502 in the Helena Division of said Court, which was tried before the Honorable W. D. Murray, U. S. District Judge for the District of Montana, sitting with a jury at Helena, Montana, on June 14th and 15th, 1951, and that the foregoing is a full, true and correct transcript of all the proceedings had at the trial of said cause, with the exception of the voir dire examination of the jury.

Dated at Butte, Montana, this 24th day of July, 1951.

/s/ JOHN J. PARKER,
Official Court Reporter.

[Endorsed]: Filed August 22, 1951. [239]

CLERK'S CERTIFICATE TO
TRANSCRIPT OF RECORD

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable the United States Court of Appeals for the Ninth Circuit, that

the foregoing two volumes consisting of 240 pages, numbered consecutively from 1 to 240, inclusive, constitute a full, true and correct transcript of all portions of the record in Case No. 502, Ray P. Koenig vs. Donald Corcoran, required to be incorporated therein by designation of the appellant, as the record on appeal therein, as appears from the original records and files of said Court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Thirty-two and 80/100 Dollars (\$32.80) and have been paid by the appellant.

Witness my hand and the seal of said court at Helena, Montana, this August 27, 1951.

[Seal] /s/ H. H. WALKER,
Clerk, U. S. District Court,
District of Montana.

[Endorsed]: No. 13079. United States Court of Appeals for the Ninth Circuit. Ray P. Koenig, Appellant, vs. Donald Corcoran, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed August 30, 1951.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

Case No. 13079

RAY P. KOENIG,

Plaintiff,

vs.

DONALD CORCORAN,

Defendant.

POINTS RELIED UPON

To the Clerk of the United States Court of Appeals
for the Ninth Circuit:

Pursuant to Rule 19, we present the following as
points relied upon in this Appeal:

I.

Under the evidence the case presented was and
is one for submission to a jury.

II.

The Court erred in sustaining Defendant's Motion
for Dismissal and ordering dismissal of the action
pursuant to said Motion.

Dated this 22nd day of October, 1951.

LANIER & LANIER,

By /s/ P. W. LANIER, SR.,

By /s/ P. W. LANIER, JR.,

Attorneys for Plaintiff and
Appellant.

By /s/ ANDREW G. SUTTON,

Attorney for Plaintiff and
Appellant.

[Endorsed]: Filed Oct. 26, 1951.

United States Court of Appeals

NINTH CIRCUIT.

No. 13079

CIVIL.

RAY P. KOENIG,

Appellant,

vs.

DONALD CORCORAN,

Appellee.

Appeal from the United States District Court
for the District of Montana,
Helena Division.

APPELLANT'S BRIEF

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FILED

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United States Court of Appeals

NINTH CIRCUIT.

No. 13079

CIVIL.

RAY P. KOENIG,

Appellant,

vs.

DONALD CORCORAN,

Appellee.

APPELLANT'S BRIEF

This is an appeal from a judgment and an Order of the Court sustaining motion to dismiss (R. 11).

Jurisdiction is invoked by virtue of diversity of citizenship as set out in the complaint (R. 3).

The complaint and answer thereto (R. 3-8, inclusive).

This is an action for damages for alienation of affections and it is claimed by the plaintiff that over a period beginning in November, 1947, and covering up to the time when a divorce was granted to plaintiff's wife, and covering further the fact that subsequent to the divorce, the defendant married plaintiff's former wife.

SUMMARIZATION AND STATEMENT

The defendant was called as a witness and testified that he met plaintiff's wife at the Duchess, a tavern about one mile west of Bemidji, Minnesota, late in No-

vember of 1947, when and where she was formally introduced to him by Elicia Utter (R. 15). Therafter, he repeatedly saw her and kept company with her.

The witness Strowbridge testified that he saw the defendant and plaintiff's then wife together in the fall of 1947 and that he first saw them together about November 11, 1947 (R. 20-21). Some weeks he would see them together two or three times and some weeks not at all (R. 22-23).

The witness Hiltz testified that he saw the defendant in the company of Mrs. Koenig at the tavern—the Duchess—during the fall of 1947; that they were together and having beer together (R. 34). In January and February, 1948, he saw defendant and Mrs. Koenig together in the tavern, or in the yard, and also saw them together in defendant's automobile (R. 35).

The witness Suckert testified that in the latter part of February, 1948, he saw defendant and Mrs. Koenig together in defendant's automobile parked in the yard near the tavern (R. 41-42) and saw this happen frequently (R. 42). Quite a few times after the closing of the tavern, he would go from the tavern to town and get something to eat and would return at around three or four o'clock in the morning and Mrs. Koenig and the defendant would be in the automobile together in the vicinity of the tavern (R. 42).

That in February or March of 1948, he saw defendant and Mrs. Koenig lying on the bed together in the residence near the tavern; that it was after closing time of the tavern where he worked, and closing time was about one o'clock a.m. (R. 43); that they were on the bed that he usually slept in downstairs; that no one was at the home, and when he came in, defendant and Mrs. Koenig were the only people in the residence;

that he asked them what they were doing (R. 43) and was told: "to go up stairs and sleep" (R. 43).

Plaintiff testified that he was Service Manager for W. W. Wallwork in Fargo, and that this was the largest Ford Dealer in the northwest with offices in Fargo, North Dakota, and Moorhead, Minnesota.

Much of the testimony of plaintiff in chief is left out of the printed record in order to save as much expense as possible but enough is in the record to enable this Court to pass on the legal questions involved.

During the period from July, 1947, down to November, 1947, plaintiff was staying and working at Brainerd, Minnesota, and his wife was visiting and staying with her sister at Bemidji, Minnesota, and they were alternating on week ends, he visiting her one week end and she visiting him the next week end (R. 45-46). During all of this time, he was supporting his wife (R. 46); that the latter part of November, 1947, his wife became noticeably cool toward him (R. 47-48); that on Christmas Eve, he took gifts to his wife and her relatives and his boy and went to the home of his wife's sister for Christmas and Christmas Eve, and after the gifts were given by all parties, she told him that she no longer loved him. The wife was granted a divorce from him in May, 1948 (R. 49), and he learned for the first time after the divorce of his wife's relation with defendant; prior to the divorce he had never to his knowledge seen defendant (R. 50). His former wife married the defendant after the divorce was granted and is his wife now (R. 50). For five years immediately preceding the trial, he has had ten days off from work (R. 46).

POINTS

I.

Under the evidence, the case presented is and was one for submission to a jury.

II.

The Court erred in sustaining defendant's motion for dismissal and ordering dismissal of the action pursuant to said motion.

ARGUMENT

Points I and II will be considered together.

A motion for directed verdict or dismissal tests the legal sufficiency of the evidence and is a quasi admission of the truth of the evidence. It admits the facts stated in the evidence adduced, and it admits as true every fact which the evidence tends to prove and any favorable conclusion in behalf of the adverse party that a jury might fairly and reasonably infer from the testimony. Thus, the defendant by a motion for a directed verdict or dismissal on the evidence introduced by the plaintiff, admits not only the testimony to be true, but also every conclusion which a jury might fairly or reasonably infer therefrom insofar as the ruling on the motion is concerned.

53 Am. Jur., Sec. 340, p. 273;

State v. Quism, 111 S. Car. 174, 97 S. E. 62, 3 A. L. R. 1500;

Smith v. Berdine's Inc., 144 Fla. 500, 198 So. 223, 138 A. L. R. 115;

Exchange State Bank v. Occident Elevator Co., 95 Mont. 78, 24 Pac. (2d) 126, 90 A. L. R. 740;

Long v. Davis, 68 Mont. 85, 217 Pac. 667;

Anderson v. Border, 75 Mont. 516, 244 Pac. 494.

The Trial Court should not assume to direct a verdict when its ruling would require it to pass upon the credibility of witnesses and weigh testimony or would require it to resolve conflicts in the evidence.

53 Am. Jur., Sec. 362, p. 292.

Assuming that we are sound in the foregoing, and we think we are, without conflict in the law, what is the force, effect and strength of the evidence in this case when met by a motion for dismissal?

The evidence shows without contradiction that defendant met Mrs. Koenig, plaintiff's former wife and defendant's present wife, in the early part of November, 1947; that she was formally introduced to him (R. 15). This is an established fact. From this we must infer that she was introduced as Mrs. Koenig, and that defendant knew she was married. Certainly, upon the issue of whether or not he knew she was married, there was evidence upon which this issue should have been submitted to the jury regardless of the fact that he subsequently in his testimony said he did not know she was married until the latter part of February, 1948. This is especially true when we have a witness with interest in the result of an action, the party defendant.

53 Am. Jur., Sec. 367, p. 297.

The testimony of an interested witness does not conclusively establish the facts testified to although there is no evidence directly contradictory thereto, since the credibility of the testimony of such witness presents a question of fact for the jury.

Sonnenthiel v. Christian Moerlein Brewing Co., 172 U. S. 401, 43 L. Ed. 492;

Reppert v. White Star Lines, 328 Pac. 346, 106 A. L. R. 413;

Volkman v. Manhattan Ry. Co., 134 N. Y. 418, 31 N. E. 870, 70 A. L. R. 34.

Now, viewing the testimony in the light most favorable to plaintiff, we have the defendant meeting Mrs. Koenig the early part of November, 1947, and find him seeing her three or four times a week during the fall, at least some weeks, and the evidence warrants the inference that this carried on continuously up to the time when he was seen at one o'clock in the morning in bed with Mrs. Koenig in a residence all alone and one mile from town; and when seen by the person whose bed they were using, such person was told by the defendant and Mrs. Koenig to go on upstairs and "go to sleep". This is positive testimony as to which there is no contradiction.

That there was a divorce in May, 1948, is not in dispute. That this defendant after this divorce married Mrs. Koenig, is not in dispute.

This divorce and subsequent marriage when taken in connection with all that happened from November up until the divorce and subsequent marriage is not only evidence that makes out a prima facie case, but is evidence that might be termed as conclusive against the defendant under the charge of having alienated the affections of plaintiff's wife.

We may be subject to the charge of not having put in all of the evidence that the Court would like to see with regard to the testimony of the plaintiff, but we feel that in support of authorities relied upon, the evidence is overwhelming and this deletion is done in order to save expense to the plaintiff.

A careful reading of the cross examination of the plaintiff (R. 50 to 77, inclusive) will show this to be

an attack by innuendo and insinuation with very little probative value on the issue involved in this appeal.

The Court in passing on the Motion for dismissal said that the fact that a man and woman were lying on a bed together at one o'clock in the morning with no one in the house but them, one mile from town and nobody around would not give the jury a right to infer that there was any immorality contemplated or indulged (R. 84-85). The Court to have reached such a conclusion must have been superlatively pure minded. The rule applicable deals with the ordinary man in the exercise of ordinary common sense under all the circumstances and not with what a superlatively pure minded person would think.

“WHEN AN INFERENCE ARISES. An inference must be founded:

1. On a fact legally proved; and
2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business or the course of nature. Title 93, Sec. 1301-4. Revised Codes of Montana, 1947.”

In *Hillers v. Taylor*, 108 Md. 148, 69 Atl. 715, Alienations of Affections, the following instruction embodies what, in our humble opinion, is the pertinent law:

“You are further instructed that in order for the plaintiff to recover damages against the defendant, it is not necessary that the plaintiff should prove any one act of illicit intercourse, which is conclusive of guilt, but the jury must consider the opportunity for the commission of the act, the conduct of the parties, and all the circumstances, and then determine from the whole of the testimony whether it should convince unprejudiced and cautious persons of the guilt of the parties; and if upon a consideration of all the evidence in the case the jury

are satisfied of the commission of one act of illicit intercourse then their verdict should be for the plaintiff."

We respectfully submit that the evidence adduced by the plaintiff is overwhelming in its sufficiency for the presentation of this case to a jury and that the Court in sustaining the motion for dismissal and entering judgment of dismissal herein erred and that this case should be remanded for retrial subject to the directions of this Court in the Opinion which may be filed herein.

Dated: December 17, 1951.

P. W. LANIER,
P. W. LANIER, Jr.,
FRANK T. KNOX,
LANIER, LANIER & KNOX,
Fargo, North Dakota,
ANDREW G. SUTTON,
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United States Court of Appeals

NINTH CIRCUIT.

No. 13079

CIVIL.

RAY P. KOENIG,

Appellant,

vs.

DONALD CORCORAN

Appellee.

Appeal from the United States District
for the District of Montana,
Helena Division.

APPELLEE'S BRIEF

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United States Court of Appeals

NINTH CIRCUIT.

No. 13079

CIVIL.

RAY P. KOENIG,

vs.

DONALD CORCORAN,

Appellee.

Appellee's Brief

STATEMENT

Appellant has pretended to make a brief summary of the evidence, but we feel that the said so-called summary is nothing but a fragile attempt to breathe strength into a few inferences, based upon inferences, based upon circumstances which have no probative value upon the issues involved. We are therefore constrained to analyze the evidence of all of the witnesses in so far as it has any bearing upon Plaintiff's prima facie case.

The Transcript contains the testimony of only three witnesses, aside from the testimony of the Plaintiff himself, and the Defendant who was called to testify by the Plaintiff; all three witnesses either worked or were hangers-on at "a tavern" located outside of the city of

Bemedji, Minnesota. The first of the witnesses is C. H. Strowbridge, who testified that he was the owner of the tavern and had his residence within one hundred feet from said tavern (See Tr. p 18); the testimony of Strowbridge is that said Eunice (Koenig) Corcoran was living separate and apart from the Plaintiff (Ray Koenig) for several months before the Defendant could have known the identity of said Eunice Corcoran (See Tr. p. 26):

“Q. I believe you testified that Eunice Koenig was living at your place in the fall of 1947? A. Yes. Q. When did she come there? A. She came there in the month of July, 1947. Q. And stayed in your home? A. That’s right. Q. For how long? A. Well, she come there and made that her home until she left the next June, sometime in July, I believe she left there then. Q. In 1948? A. Yes. Q. The subsequent year? A. Yes. Q. Did she have a child with her? A. Yes. Q. Did the child make his home at your residence during that time? A. That’s right. Q. And that was her home during that period? A. That’s right. Q. Ray wasn’t living there during that time I don’t suppose? A. No. Q. Where was he living? A. Brainerd.”

It was also significant that when pressed upon cross examination about whether said Eunice Koenig had been out with said Defendant in the fall of 1947, said Strowbridge testified as follows: (Tr. p. 31)

“Q. Actually you have seen her out with a number of different men, have you not, during the fall and winter of 1947-1948; Is that not true? A. I have seen her out with one man in the fall of 1947 because I was with him. Q. His name, as you have mentioned, is Russell McKenzie? A. Russell McKenzie, that’s right. Q. Is that the *only man you have seen her with in the fall of 1947?* A. *That’s the only one I can really say had her out.*” (Italics ours)

The next witness is Robert Hiltz, who testified that he had been in and about the tavern of said Strowbridge in 1947 and 1948; On cross examination he was asked and gave answers as follows:

(Tr. p 38)

“Q. I believe you testified you saw Eunice (Koenig) in 1948? A. That’s right. Q. Did you see her in 1947? A. That’s right. Q. But you never went anywhere except to the Dutch Tavern, I believe you said? A. That’s about all. I went to shows and around town, certainly, but as far as night clubs, no. Q. You have seen Eunice in the night club, the Dutchess, in 1948? A. That’s right. Q. What was she doing? A. Well, I suppose the same as anybody.” . . .

(Tr. p 39)

Q. Of course, I am referring now to Eunice, what was she doing in there when you saw her there? Was she drinking beer? A. That’s right. Q. Was she drinking hard liquor? A. Can’t say, I didn’t keep an eye on her that close. . . . Q. Does that refer to Eunice, too, you didn’t pay much attention to what she was doing? A. That’s right. Q. Well, then do you know what she was doing in the Dutch Tavern when you saw her in there? A. I’ve seen her around once in a while, a guy can’t help seeing what’s going on once in a while, can he? . . .

(Tr. p 40)

Q. Do you know whether on any of these occasions that you saw her there she had a *date* with anybody? A. *No, I cannot.* Q. All you know is that you saw her there, is that it? A. Yes, I have saw her there.”

(Italics ours)

The other witness is Roland F. Suckert, who testified that in 1948 he was eighteen years old, and did not know the Defendant, Donald Corcoran, until the latter part of

February, 1948. The only testimony offered by said Suckert which apparently is what is relied upon by the Plaintiff to establish a prima facie case was the testimony which is set forth on page 43 of the transcript, as follows:

“Q. Well, when you came in, who did you find there? A. I found Eunice and Corcoran. Q. What were they doing? A. Well, they were just laying on the bed. Q. The bed or davenette? A. I would say both places. Q. You say you saw them on the bed; was that upstairs or downstairs? A. Downstairs. Q. And what were they doing, what did they say to you or what did you say to them? A. I asked them what they was doing, and they said, “You go upstairs and sleep”

The testimony fixes no particular day, or even month, when it might have occurred, if it did occur, although admittedly it had to be after the latter part of February, 1948, to be consistent with the former testimony of Suckert, when he testified that he never met Corcoran until the latter part of February, 1948. (See Tr., p 41)

When this witness was asked whether they were lying on the bed or davenette, he testified, “I would say both places” (See Tr. p 43). This does not explain whether one was lying on the davenette and the other on the bed, or whether they were jumping from the bed to the davenette, nor what their conduct was supposed to have been. When counsel asked the witness what they were doing, the witness did not answer that they were doing anything.

The foregoing is substantially the testimony of all of the three witnesses who testified on behalf of the Plaintiff. The only other witness aside from the Defendant, is the Plaintiff himself, and the Plaintiff does not pretend to any personal knowledge concerning the conduct of the

defendant at any time and relies exclusively upon the testimony of the three witnesses last mentioned, to make out his entire case.

ARGUMENT

It is to be noted that Plaintiff in his original complaint made no claim or assertion that defendant had known the wife of the Plaintiff carnally and that it was only after counsel for Plaintiff found that the Court was about to grant a motion to dismiss the Complaint for lack of evidence that they moved to amend the Complaint to take advantage of whatever inferences could be drawn from the testimony of Roland F. Suckert, *supra* (Tr. p 80). However, both the evidence and pleadings fall far short of whatever is required to prove adultery. In the case of Kenworthy vs. Richmond, 149 Pac. p 350 (Wash.) the Court said:

“The first part of the instruction stated to the jury that: ‘While the complaint in this action does not directly charge the defendant Richmond with having committed adultery with the wife of the plaintiff, yet if you find by a preponderance of the evidence that the defendant Richmond and the wife of the plaintiff occupied a room in the Palace Hotel together, you may consider that fact in determining whether the defendant Richmond is liable in this case.’ The jury no doubt understood from that statement that the complaint did state that Richmond and the Plaintiff’s wife had committed the crime of adultery, and that if they so found, then it followed that Richmond was liable. We think this is clearly erroneous, first, because the complaint does not charge adultery; and second, because the evidence was entirely insufficient to be submitted to the jury upon that question. The Court should therefore

have instructed the jury as requested by the defendants upon the question of adultery, and should not have given the instruction which was given. We have no doubt that this instruction was prejudicial, and that the jury based the verdict largely, if not wholly, upon it. The judgment is therefore reversed, and the cause remanded."

and quoting Bishop, in Marriage, Divorce & Separation, Vol. 2, Para 1325, we quote:

"The act of adultery must be duly shown. The allegation should state positively, not from information and belief, or otherwise in uncertain terms, that, at a time and place specified, the defendant committed the carnal act with a person named; unless something of this particularity is unknown, when the want of knowledge may be averred as a substitute therefor."

The Plaintiff in his original complaint, and as amended, has charged (See Tr. p 3) as follows:

"

II

That on the 8th day of March, 1942, plaintiff married Eunice Jantvold in Walker, County of Cass, Minnesota, and thereafter lived in the State of Minnesota up to and until July, 1947, *when plaintiff's wife left him and went to the home of her parents in Bemidji, Minnesota, where she stayed with the exception of a day or two at a time when she would come back and stay with plaintiff, and that this continued until Christmas, 1947 when plaintiff's wife advised him that she didn't love him and wanted a divorce;*" (Italics ours).

The Plaintiff also testified in accordance with said pleadings that on Christmas of 1947, his wife, EUNICE KOENIG, told him that she no longer loved him. (See Tr. p 48). According to the testimony this conversation

took place over five months after the Plaintiff's wife had already left him, and at a time when the defendant Corcoran had never even so much as had a speaking acquaintance with Plaintiff's wife.

In discussing the elements required to make out a case of alienation of affections, the following statement is set forth in 42 Corpus Juris Secundum, p 321:

"669. DEFENDANT NOT PROCURING CAUSE. The defendant is liable if his wrongful acts were the controlling cause of the alienation of affections, although there were other contributing causes. In order to hold defendant liable, his wrongful acts or conduct must have been the *procuring or controlling cause* of the enticement or alienation; he is not liable if the acts complained of did not alienate the affections of plaintiff's spouse or cause the separation. The elements of the cause of action are defendant's wrongful conduct, plaintiff's loss of his or her spouse's affection or consortium, and the causal connection between such conduct and the loss." (Italics ours).

And in the case of Johnson v Linquist, 1929, 177 Minn. p. 270, 224 N.W. 839, the Court said:

"In order to recover damages for the alienation of the affections of his wife, the husband must show that the defendant took an active and intentional part in causing the estrangement and the loss of the wife's affections; that he acted wrongfully and intentionally, it must appear that defendant's wrongful acts and intentional conduct were the controlling cause which led to the estrangement."

See also Bershire vs Harem, (Ore.) 178 Pac.
2nd, 133

Sharp vs Hayes (Del. Super) 50
A2 p 412

Waldron vs Waldron, 156 V.S. 361
39 L. Ed. 453

BURDEN OF PROOF

See 42 Corpus Juris Sec. p 332

"Plaintiff has the burden of proving all the essential elements of his cause of action . . .

In an action for enticement or alienation of the affections of a spouse, plaintiff has the burden of showing all the essential elements of his or her cause of action. In general, plaintiff has the burden of proving that the affections of the spouse were actually alienated from plaintiff by the wrongful acts or conduct of defendant, and that defendant had knowledge of the marital relationship . . ."

In commenting upon evidence sufficient to withstand a Motion for a directed verdict, the Court, in the case of *Bravo vs Sharkey*, (Cal.) 218 Pac. 2nd, p 788, stated:

"Defendant's second contention is likewise without merit. When the Supreme Court in *Blumberg v M. & T. Incorporated*, 34 Cal. 2nd—, 209 P 2d 1, 3, said 'A trial court is justified in granting a motion for non-suit . . . when, and only when, disregarding conflicting evidence and giving to Plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff', it meant that the evidence must be sufficient to raise something more than mere surmise or conjecture."

See Also 27 Am. Juris. p 125

The condition of this case does not involve, as appellant would like to pretend, any consideration of comparative

evidence, nor did the trial court pass upon the credibility of witnesses in its consideration of the Motion to dismiss.

In a statement of reasons for granting the Motion to dismiss, the Court said: (See Tr. p 89-90):

“In a case of this kind there are three main elements that have to be proved. These elements are that the Plaintiff has to prove the defendant’s wrongful conduct, then he has to prove the alienation of the affections of his wife, and then he has to prove that the defendant’s wrongful conduct caused the alienation of affections. Well, the proof here just didn’t entitle a jury to believe that. The proof of the Plaintiff himself was that the wife’s affections were at least alienated upon Christmas Eve, at least by that date, when she so announced to him they were alienated and she didn’t love him any more and wanted a divorce. That was his proof. The proof with reference to the defendant up to that time is just practically that he had met the wife at that point. The proof is further he didn’t know who she was at that time. There is no evidence from which the jury would find even that he knew she was a married woman, and the acts of the defendant that were proved were nothing from which I believe the jury would be warranted in finding that his acts were wrongful. Apparently he met her at a bar which she frequented, where she lived with the owner of the bar and worked there at times, helped out, and the defendant on occasions, at least prior to the time when her affections were proved by the plaintiff to have been alienated. You couldn’t find from those facts that the defendant’s acts alienated her affections. There is just a complete failure of proof, and in my opinion, I don’t think the jury would be warranted in finding that there was such proof. The whole matter comes down to that general, simple proposition that the defendant’s conduct was not such as to alienate her affections at that point.

It must be established in any event that his conduct was wrong, that his intention was to alienate her affections from the plaintiff, that that was his purpose, that he enticed her away from the plaintiff. Now, from all of the circumstances of the case, the jury just couldn't believe that. The whole marriage relationship, The whole course of the marriage and the actions of the Plaintiff are such that the jury would just be acting, if they acted in favor of the plaintiff, would be acting out of some generosity or some other matter other than pure facts of the case. As I say, you have to find not only that the plaintiff engaged, or that the defendant engaged in wrongful conduct, and not only find her affections were alienated, but you have to find that his conduct was the cause, or, at least a contributing cause of the alienation of the affections, and it just isn't in the evidence."

CONCLUSION

Appellee respectfully submits that the trial court would have abused its discretion if it had not granted the Motion to Dismiss, in that the evidence is totally lacking, either in the statement of any facts or any inferences which can be reasonably drawn from the evidence to indicate that the said Defendant in any way interfered with the Plaintiff and his wife, nor that he, the defendant, engaged in any conduct which could in any sense be considered as a *controlling or procuring* cause of the estrangement between the plaintiff and his wife, and that consequently the Order and Judgment of the Trial Court should be affirmed.

Respectfully submitted this 30th day of January, 1952.

H. B. LANDOE,
Bozeman, Montana,
Attorney for Appellee.

No. 13.079

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

RAY P. KOENIG,

Appellant,

vs.

DONALD CORCORAN,

Appellee.

Petition for Rehearing

HJALMAR B. LANDOE,
Attorney for Appellee.

FILED

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IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

RAY P. KOENIG,

Appellant,

vs.

DONALD CORCORAN,

Appellee.

Petition for Rehearing

Comes now the Defendant and Appellee, DONALD CORCORAN, and petitions the Court for a re-hearing upon the following grounds:

That the opinion of the Circuit Court of Appeals in reversing the order of the Judge of the United States District Court, dismissing the above entitled cause and remanding said cause for trial, is wrong in principle and places the Ninth Circuit in conflict the great weight of authority on the question of when an issue shall be submitted to a jury and authorizes an appellate court to draw inferences and to speculate on the meaning of evidence which produces mere conjectures.

Argument

The established rule in Montana is that evidence producing mere conjecture does not satisfy Plaintiff's burden of affirmatively proving allegations against Motion for non-suit.

Stiemke vs Janovich et al
72 Mont. 363, 233 Pac. 904

In order to hold defendant liable, his wrongful acts or conduct must have been the procuring or controlling cause of the enticement or alienation.

See *Corpus Juris Secundum*,
Husband and Wife, para. 669.

Plaintiff failed to offer in evidence a single fact which in itself tended to prove or from which a fair inference could be drawn which could satisfy the burden upon the plaintiff to show that the conduct of the defendant Corcoran was the controlling cause of the alleged alienation of affections.

In this respect we respectfully remind the Court that Plaintiff's evidence admits that Plaintiff and his wife were living apart when defendant met her and Plaintiff's evidence further admits (by inference) that Plaintiff's marriage was a marriage of necessity, brought about by the pregnancy of Plaintiff's wife, who had a miscarriage two months after the marriage (See Tr. p 55-56); thereafter the evidence as adduced on cross examination clearly shows that Plaintiff and his wife were not living together in harmony, but on the contrary that the conduct of the Plaintiff was such as to indicate a total lack of filial devotion which culminated in the decision of Plaintiff's wife (Eunice), to announce to the Plaintiff that she was going to get a divorce, which occurred on Christmas eve, 1947.

There is nothing in the record that even remotely suggests that the defendant enticed Eunice to leave the Plaintiff, nor that at any time did he force or urge his attentions upon her.

In other words, no matter what one might speculate the facts to be, the record is barren of any evidence to show that the Defendant was a controlling influence in effecting

the alienation; and that a conclusion to that effect must necessarily be based upon speculation.

In the case of *Berger vs Levy* (Calif.) 43 Pac. 2nd, page 610, the Court reasoned the matter thus:

“It is well settled that there is no ground for action where a spouse voluntarily gives his or her affection to another, the latter doing nothing wrongfully to win such affection; that is to say, in order to establish liability, it must be shown that the defendant is the enticer, and mere proof of abandonment, or that the husband or wife may be maintaining an improper relation with another, is not sufficient.”

The facts in the case of *Moelleur vs Moelleur*, 55 Mont. 30, which is cited by the Court, is to be distinguished from the evidence in the record in this case in that in the *Moelleur* case the evidence on the part of the plaintiff showed that the plaintiff and her husband, Dr. Moelleur, were living together as husband and wife in the same community where the defendant (then Mrs. Mary Reynolds) resided; that said Mrs. Reynolds knew of the marriage relation and during said relationship expressed her fondness for Dr. Moelleur and expressed her desires to be with him and made the admission that she was responsible for Dr. Moelleur filing suit for divorce against the plaintiff. That is quite a different situation compared to the record in the instant case wherein there is no evidence of so much as a conversation between the defendant and the estranged wife of the plaintiff and that the defendant did not even know that the plaintiff's wife was married until several months after plaintiff's wife had separated from him.

This distinction is pointed out for the reason that the

record ought to furnish something more than mere speculation and guess work as a basis for any inference that the defendant enticed the wife of plaintiff from him and to support the position that the defendant forced his attention upon her.

Admittedly, plaintiff's case relies entirely upon indirect or circumstantial evidence.

Indirect evidence is defined by Revised Codes of Montana, 1947, as follows:

"Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. For example, a witness proves an admission of the party to the fact in dispute. This proves a fact from which the fact in dispute is inferred."

93-301-10-RCM 1947

Satisfactory evidence is defined as follows:

"The evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence."

93-301-13 RCM 1947

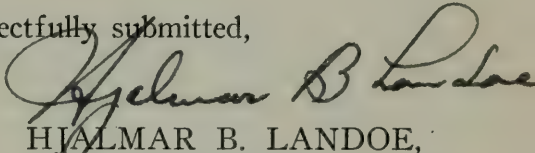
The evidence of the plaintiff is that upon a number of occasions the wife of the plaintiff and the defendant were seen together. That is all. From this fact is it reasonable to infer that the defendant was the aggressor in forcing his attentions upon her as against the equally reasonable inference that she was the aggressor and forced her attentions upon the defendant?

Conclusion

Our contention is, to repeat, that since this is a circumstantial evidence case, the question to be decided is, is there any evidence in the record which justifies an unprejudiced mind in believing to a moral certainty that the defendant, DONALD CORCORAN, was the aggressor and enticer and that he was the controlling cause for alienating the affections of Eunice from the plaintiff?

We respectfully submit that the evidence offered does not justify such an inference and therefore the defendant should not be subjected to the expense and ordeal of another trial.

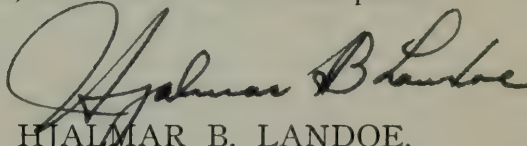
Respectfully submitted,



HJALMAR B. LANDOE,
Attorney for Appellee.

Certificate

The undersigned counsel hereby certifies that he prepared the foregoing Petition for Rehearing; that in his judgment it is well founded, and that it is not interposed for delay.



HJALMAR B. LANDOE,
Counsel for Appellee.

No. 13082

**United States
Court of Appeals**
for the Ninth Circuit.

JOHN COSTELLO, Trustee of the Estate of
ANGELO PAGLIARO, Bankrupt,
Appellant,
vs.
C. N. GOLDEN,
Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

No. 13082

**United States
Court of Appeals**
for the Ninth Circuit.

JOHN COSTELLO, Trustee of the Estate of
ANGELO PAGLIARO, Bankrupt,
Appellant,
vs.
C. N. GOLDEN,
Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

SHAPRO & ROTHSCHILD,

155 Montgomery St.,
San Francisco 4, California,
Attorneys for Appellant.

MORAN & MILLSPAUGH,

2562 Macdonald Ave.,
Richmond, California,
Attorneys for Appellee.

United States District Court for the Northern
District of California, Southern Division

No. 39166 In Bankruptcy

In the Matter of:

ANGELO PAGLIARO,

Bankrupt.

ORDER OF ADJUDICATION AND
REFERENCE

At San Francisco, in said District, on the 5th day of September, 1950.

The Petition of Angelo Pagliaro, filed on the 5th day of September, 1950, that he be adjudged a bankrupt under the Act of Congress relating to Bankruptcy, having been heard and duly considered, and no opposition being made thereto,

It Is Adjudged that the said Angelo Pagliaro bankrupt under the Act of Congress relating to Bankruptcy.

It Is Ordered that the above-entitled proceeding be, and it is hereby referred to Bernard J. Abrott, one of the Referees in Bankruptcy of this Court who will be in charge thereof, and to Burton J. Wyman, Referee in Bankruptcy of this Court, in the event Bernard J. Abrott, shall be unable to act to take such further proceedings therein as are required and permitted by said Act, and that the said Angelo Pagliaro shall henceforth attend before the said Referee and submit to such orders as may

be made by him or by a Judge of this Court, relating to said bankruptcy.

It Is Further Order that all notices required to be published in the above-entitled matter, and all orders which the Court may direct to be published, be inserted in "The Inter-City Express," a newspaper published in the County of Alameda, State of California, within the territorial district of this Court, and in the County within which said bankrupt resides.

Dated Sept. 5, 1950.

/s/ LOUIS E. GOODMAN,
District Judge.

[Endorsed]: Filed September 5, 1950.

[Title of District Court and Cause.]

ORDER APPROVING BOND

It Appearing to the Court that John Costello, of the City of Oakland, California, in said District, has been duly appointed Trustee of the Estate of the above-named Brankrupt, and has given a Bond with sureties for the faithful performance of his official duties in the amount fixed by the Referee, to wit: \$200.00.

It Is Hereby Ordered, that the said Bond be, and the same is hereby approved.

Dated at Oakland, California, the 26th day of September, 1950.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed September 26, 1950, Referee.

[Endorsed]: Filed September 29, 1950, U.S.D.C.

[Title of District Court and Cause.]

PETITION FOR TURN OVER ORDER

To Honorable Bernard J. Abrott, Referee in Bankruptcy:

The Petition of John Costello respectfully represents:

That your Petitioner is the duly appointed, qualified and acting Trustee of the estate of the Bankrupt above named.

That at the time of the filing of the Petition in Bankruptcy said Bankrupt was in possession of the furniture, fixtures and equipment of a certain restaurant located at 1819 University Avenue, Berkeley, which personal property was being purchased by said Bankrupt from C. N. Golden.

That subsequent to the filing of the Petition in Bankruptcy and during the month of October, 1950, said Bankrupt turned over said property to C. N. Golden, who sold the same for the same for \$4,-750.00, which sum your Petitioner believes was the reasonable value of said property.

That your Petitioner has been advised that said property was being purchased by said Bankrupt from C. N. Golden on a Conditional Sales Contract and that at the time said property was turned over by said Bankrupt to said C. N. Golden there was a balance due under said contract of \$3,676.00, but your Petitioner has no information or belief as to the validity of said Conditional Sales Contract.

Wherefore, your Petitioner prays that an Order be made and entered herein requiring C. N. Golden to turn over to your Petitioner for administration in the above-entitled proceedings the sum of \$4,750.00, or, in the event that it is found that said Conditional Sales Contract was a valid contract reserving title to C. N. Golden, that said C. N. Golden be required to turn over to your Petitioner the sum of \$1,074.00, and for such further and other order as may be just and proper in the premises.

/s/ JOHN COSTELLO,
Trustee.

SHAPRO & ROTHSCHILD,
By /s/ AUGUST B. ROTHSCHILD,
Attorneys for Trustee.

United States of America,
Northern District of California,
County of Alameda—ss.

I, John Costello, the Petitioner named in the foregoing Petition, do hereby make solemn oath that the statements contained therein are true ac-

ording to the best of my knowledge, information and belief.

/s/ JOHN COSTELLO.

Subscribed and sworn to before me this 18th day of January, 1951.

[Seal] /s/ HOMER E. NORTH,
Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed January 18, 1951, Referee.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the reading and consideration of the verified Petition of John Costello, Trustee herein, praying for an Order requiring C. N. Golden, to turn over to said Trustee for administration in these proceedings, the sum of \$4,750.00, or, in the event that it is found that the Conditional Sales Contract referred to in the Petition for Turn Over Order, dated January 18, 1951, on file herein, was a valid contract reserving title to said C. N. Golden, that said C. N. Golden be required to turn over to said Trustee the sum of \$1,074.00, and the Court being fully advised in the premises, and this being a proper case for this Order, now on motion of Messrs. Shapro & Rothschild, attorneys for said Trustee,

It Is Hereby Ordered that said C. N. Golden, show cause before me, the undersigned Referee in Bankruptcy, at my courtroom, Room 1104, Tribune

Tower, 13 and Franklin Streets, Oakland 12, California, on the 30th day of January, 1951, at the hour of 11:00 o'clock a.m., if any he has, why said Petition should not be granted.

It Is Further Ordered that service of this Order be made by delivering a copy thereof to C. N. Golden at least seven (7) days prior to the return date hereof.

It Is Further Ordered that said C. N. Golden serve upon Messrs. Shapro & Rothschild, the attorneys for said Trustee, at their office, 155 Montgomery Street, San Francisco, California, and file with the above-entitled Court, his return to this Order at least two (2) days prior to the return date hereof, failing which the relief prayed for by said Trustee will be granted by default.

Dated this 18th day of January, 1951.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed January 18, 1951, Referee.

[Title of District Court and Cause.]

ANSWER TO PETITION OF TRUSTEE FOR
TURN OVER ORDER AND PETITION
FOR RECLAMATION OF ASSETS HELD
BY TRUSTEE

To Honorable Bernard J. Abrott, Referee in Bankruptcy:

The answer of C. N. Golden respectfully states:

That C. N. Golden at all times mentioned herein was and now is the vendor of a Conditional Sales

Contract dated July 7, 1950, and recorded in the Office of the Recorder, County of Alameda, State of California, July 12, 1950, of the furniture, fixtures and equipment of a certain restaurant located at 1819 University Avenue, Berekeley, California, which personal property was being purchased by the above-named Bankrupt under said Conditional Sales Contract.

That the trustee has not elected to assume the above-mentioned Conditional Sales Contract;

That more than 60 days have expired since the adjudication of the above-named Bankrupt;

That said property mentioned in the first paragraph above was sold by the Vendor, C. N. Golden, under an executory contract of sale without petitioning the above-entitled Court;

That the Vendor, C. N. Golden, has not made any money to date from the sale of the above-mentioned personal property since the first sale of same to the above-named Bankrupt.

Wherefore, said Vendor, C. N. Golden, prays that the Petition of Trustee be dismissed and for such further relief as may seem just in the premise.

The Petition of C. N. Golden respectively shows:

That C. N. Golden is the Vendor of a Conditional Sales Contract of Personal Property dated July 7, 1950, of the furniture, fixtures and equipment of a certain restaurant located at 1819 University Avenue, Berkley, California, now in the possession and/or control of the Trustee;

That said Trustee has not elected to fulfill the Conditional Sales Contract;

That more than 60 days has elapsed since the

adjudication of the above-mentioned Bankrupt;

That said Vendor has received no moneys under the terms of the Conditional Sales Contract from the Trustee;

That said Vendor as and part of the Conditional Sales Contract undertook to lease and did lease to the said Bankrupt the premises at 1819 University Avenue;

That said Trustee has not elected to assume the above-mentioned lease of real property;

That said Vendor has spent more than \$1,000.00 to preserve and maintain the said premises and/or personal property located at same address;

That said Petitioner, C. N. Golden, has received no money from the Trustee as and for the preservation of said assets of the Bankrupt and has received no money on behalf of said Conditional Sales Contract or any money whatsoever from the Trustee since the Adjudication of the Bankrupt.

That under the terms of said Conditional Sales Contract and under the Laws of the State of California, said Petitioner has the right to declare the Contract at an end, and in such case to retain all payments paid thereunder as liquidated damages for nonperformance of the contract on the part of said buyer, and for use of and injury to said property;

That the Vendor hereby exercises his rights under the Contract and the Laws of the State of California and declares the Contract at an end.

Wherefore, the petitioner prays that an order be made and entered herein requiring the Trustee to turn over to Petitioner C. N. Golden, the possession

of said personal property; that title to said personal property be reclaimed to said petitioner, that the Contract be declared at an end, and that the said lease to the above-described piece of real property be declared at an end, and for such other and further order as may be just and proper in the premises.

/s/ C. N. GOLDEN,

Vendor and Petitioner.

MORAN AND MILLSPAUGH,

By /s/ PHILLIP M. MILLSPAUGH,

Attorneys for Vendor and
Petitioner.

United States of America,
Northern District of California,
County of Contra Costa—ss.

I, C. N. Golden, the Petitioner and Vendor named in the foregoing Petition and Answer, do hereby make solemn oath that the statements contained therein are true to the best of my knowledge, information and belief.

/s/ C. N. GOLDEN.

Subscribed and sworn to before me this 26th day of January, 1951.

[Seal] /s/ WALTER R. KOSICK,
Notary Public in and for the County of Contra
Costa, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 30, 1951, U.S.D.C.

[Title of District Court and Cause.]

ANSWER TO PETITION FOR RECLAMATION
OF ASSETS

Now comes John Costello, as Trustee of the estate of the Bankrupt above named, and in answer to the Petition of C. N. Golden for reclamation of assets, admits, denies and alleges as follows:

1. That said Trustee has never seen the Conditional Sales Contract or the Lease referred to in said Petition, and on that ground denies that there was a Conditional Sales Contract or a Lease between said Bankrupt and said Petitioner in Reclamation.

2. That said Trustee has no information or belief as to whether said Petitioner in Reclamation has spent any money to preserve or maintain the premises or the personal property.

3. That said Trustee does not have in his possession, and never has had in his possession, the furniture, fixtures or equipment located at the time of the filing of the Petition in Bankruptcy at 1819 University Avenue, Berkeley.

Wherefore, said Trustee prays that said Petition in Reclamation be denied.

/s/ JOHN COSTELLO,

SHAPRO & ROTHSCHILD,

By /s/ AUGUST B. ROTHSCHILD,
Attorneys for Trustee.

United States of America,
Northern District of California,
County of Alameda—ss.

John Costello, the Trustee named in the foregoing Answer to Petition for Reclamation, does hereby make solemn oath that he has read said Answer and knows the contents thereof and that the same is true of his own knowledge, except as to matters therein set forth on information and belief and as to them he believes them to be true.

/s/ JOHN COSTELLO.

Subscribed and sworn to before me this 30th day of January, 1951.

[Seal] /s/ HOMER E. NORTH,
Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed January 30, 1951, Referee.

[Title of District Court and Cause.]

TURN OVER ORDER

The Petition of John Costello, as Trustee of the estate of the Bankrupt above named for an order requiring C. N. Golden to turn over to said Trustee the sum of \$1,074.00, having come on regularly to be heard on the 30th day of January, 1951, said Trustee in Bankruptcy appearing by Messrs. Shapro & Rothschild, his attorneys, and C. N.

Golden appearing by Messrs. Moran & Millspaugh, his attorneys, and evidence both oral and documentary having been introduced.

The Court hereby finds that at the time of the filing of the Petition in Bankruptcy herein, Angelo Pagliaro, the bankrupt above named, was in possession of the furniture, fixtures and equipment of a certain restaurant located at 1819 University Avenue, Berkeley, which furniture, fixtures and equipment were being purchased by said bankrupt from C. N. Golden under a Contract of Conditional Sale on which there was a balance due of \$3,676.00, and which furniture, fixtures and equipment were then worth the sum of \$4,750.00; that subsequent to the filing of the Petition in Bankruptcy and without leave of the above-entitled court, said C. N. Golden took possession of said furniture, fixtures and equipment from said Bankrupt and thereafter sold the same for the sum of \$4,750.00; that in order to effect a sale it was necessary for C. N. Golden to pay the sum of \$475.00 as a brokerage fee, for which said commission said C. N. Golden is entitled to credit,

And the court being fully advised in the premises, and this being a proper case for this order,

It Is Hereby Ordered that the Petition in Reclamation of said C. N. Golden, be denied.

It Is Further Ordered that C. N. Golden forthwith turn over and pay to John Costello, as Trustee of the estate of the bankrupt above named, the sum of \$599.00, said sum being the reasonable value of said personal property as represented by the sale

price thereof, less the balance due said C. N. Golden on his Conditional Sales Contract and less the brokerage commission paid by said C. N. Golden for the sale thereof.

It Is Further Ordered that this order is without prejudice to the rights of said C. N. Golden to file a general unsecured claim in these proceedings for any sum due him at the time of the filing of the petition in bankruptcy herein, other than the balance then due him on said Conditional Sales Contract.

Dated this 6th day of March, 1951.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed March 6, 1951, Referee.

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
TURN OVER ORDER

To Honorable Bernard J. Abrott, Referee in Bankruptcy:

The Petition of C. N. Golden Respectfully Represents:

That a final Turn Over Order was served upon your Petitioner on or about March 6, 1951, in the City of Richmond, County of Contra Costa, State of California;

That your petitioner, C. N. Golden, sold furni-

ture, fixtures and equipment to the bankrupt named above under a Conditional Sales Contract dated July 7, 1950, in which Contract your Petitioner reserved title in himself until the Contract price of \$4,776.00 was paid in full by the above-named Bankrupt;

That said Bankrupt began making payments under the terms of said Contract but never did complete all his payments thereto;

That said Bankrupt was adjudicated a Bankrupt on the 5th day of September, 1950;

That the trustee in the above-entitled action has not elected to assume the above-mentioned Conditional Sales Contract nor to fulfill any of the terms and conditions of said executory contract;

That your petitioner, C. N. Golden, has received no money from the Trustee toward fulfillment of said Conditional Sales Contract;

That your Petitioner has expended \$3,327.27, to preserve and save the Property and Business left by the Bankrupt upon his abandonment of same in order to cut down on the loss in money to your Petitioner from the abandonment of said Conditional Sales Contract by the Bankrupt, Angelo Pagliaro, and the Trustee for said Bankrupt;

That your Petitioner, C. N. Golden, filed a Petition with said Court for Reclamation of Assets claimed to be held by the Trustee for the Bankrupt;

That the Turn Over Order issued on March 6, 1951, was in direct contravention of the Laws of the United States of America, Title 11, Section 70-b;

That no preference was shown by the Court in the amount of its order to turn over \$599.00, in its findings of fact as recited in the Turn Over Order, dated March 6, 1951.

Wherefore, your petitioner, C. N. Golden, prays for a reversal of the Turn Over Order; for a stay of execution of the order pending a review of the Referee's decision; for reclamation of assets held by the Trustee; and for such other and further order as may be just and proper in the premises.

/s/ C. N. GOLDEN,

MORAN AND MILLSPAUGH,

By /s/ PHILLIP M. MILLSPAUGH,

Attorneys for Petitioner.

United States of America,
Northern District of California,
County of Alameda—ss.

I, C. N. Golden, the Petitioner named in the foregoing Petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

/s/ C. N. GOLDEN.

Subscribed and sworn to before me this 14th day of March, 1951.

[Seal] /s/ PHILLIP M. MILLSPAUGH, JR.,
Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed March 16, 1951, Referee.

[Title of District Court and Cause.]

AMENDED PETITION FOR REVIEW OF
REFEREE'S TURN OVER ORDER AND
DENIAL OF PETITION IN RECLAMA-
TION

To Honorable Bernard J. Abrott, Referee in Bank-
ruptcy:

The Petition of C. N. Golden, respectfully rep-
resents:

That a final Turn Over Order was signed by
Honorable Bernard J. Abrott, Referee in Bank-
ruptcy, in the above-entitled case against the peti-
tioner, C. N. Golden, on the 6th day of March, 1951.

That said final Turn Over Order made findings of
fact to the effect, Angelo Pagliaro, the bankrupt
above named was in possession of the furniture,
fixtures and equipment of a certain restaurant at
1819 University Avenue, Berkeley, California, which
furniture, fixtures and equipment were being pur-
chased by said Bankrupt from C. N. Golden, your
petitioner, under a Contract of Conditional Sale,
on which there was a balance due of \$3,676.00 and
which furniture, fixtures and equipment were worth
the sum of \$4,750.00; that C. N. Golden without
leave of the above-entitled Court and thereafter sold
the same for \$4,750.00, and that in order to effect
a sale it was necessary for C. N. Golden to pay
the sum of \$475.00, as brokerage fee, for which said
commission said C. N. Golden is entitled to credit;
that said order denied the petition of C. N. Golden

for Reclamation and ordered C. N. Golden to turn over and pay to John Costello as trustee of the estate of said bankrupt the sum of \$599.00.

That said Turn Over Order and Denial of Petition for Reclamation was in error in the following respects:

1. That the conditional sales contract as set forth in the Turn Over Order, described above, was valid under the laws of the State of California; that said contract contained a clause allowing the seller to repossess the said property and declare the contract at an end in case of default in any of the payments when due and said seller may keep any payments made under the contract as liquidated damages for non-performance of the contract; that said order ignored the right of a conditional seller under the laws of the State of California to repossess his property and the many federal decisions upholding the right of a conditional seller to obtain a reclamation order upon default by a buyer.

2. The Turn Over Order was in direct contravention of the Codes of the Laws of the United States, Title 11, Section 70-b, which states a trustee must elect to assume an executory contract within 60 days after adjudication; the trustee has not to date elected to assume said contract nor has he endeavored to fulfill any of the terms and conditions of said executory contract to wit; weekly sums of \$100.00 per week, until balance is paid, and payment of rent and utility service and other services furnished to said premises.

3. That said Turn Over Order took cognizance of the \$475.00 brokerage paid by C. N. Golden, to sell said property but did not consider the \$2,852.27, spent by C. N. Golden to preserve the Bankrupt's Assets and to effect a sale of the business without a loss.

4. The valuation placed upon the furniture, fixtures and equipment by the Court was based upon the sale of said property by C. N. Golden after the adjudication of the above-named Bankrupt; said valuation did not take into account that the sale was not only of the furniture, fixtures and equipment of said premise but of the lease held by C. N. Golden on the premises in which said personal property was located and the good will of said business; to date said trustee has not elected to assume said lease nor to pay for the storage of said personal property located on the leased premises in question; that the value of said lease and goodwill of the business was not determined by the Court.

5. That the Turn Over Order does not consider the type of resale made by C. N. Golden; that said resale made by C. N. Golden after the adjudication of Angelo Pagliaro, the above-named bankrupt, was not for cash but under an executory contract of sale extending over a period of three or four years; that said trustee has not elected to confirm this sale or to assume from C. N. Golden the obligations which go with this contract nor to ask C. N. Golden of the nature of said sale; that C. N. Golden may

never collect the sales price of \$4,750.00 from the buyer.

/s/ C. N. GOLDEN,
Petitioner.

MORAN AND MILLSPAUGH,
By /s/ PHILLIP M. MILLSPAUGH,
Attorneys for Petitioner.

United States of America,
Northern District of California,
County of Alameda—ss.

I, C. N. Golden, the petitioner named in the foregoing Petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

/s/ C. N. GOLDEN.

Subscribed and sworn to before me this 11th day of April, 1951.

[Seal] /s/ P. M. MILLSPAUGH, JR.,
Notary Public in and for
Said County and State.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 16, 1951, Referee.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
TO REVIEW

The undersigned, one of the Referees in Bankruptcy, in accordance with Section 39(a) (8), of the Bankruptcy Act, hereby certifies as follows:

I.

Preliminary Proceedings

On September 5, 1950, Angelo Pagliaro, who was then operating a restaurant known as Skippy's Cafe at 1819 University Avenue, Berkeley, filed a Voluntary Petition in Bankruptcy and was on said Petition adjudged Bankrupt.

That thereafter and on the 13th day of September, 1950, I caused notices of the First Meeting of Creditors to be forwarded to all creditors scheduled by the Bankrupt, including C. N. Golden.

That thereafter at the First Meeting of Creditors held on the 25th day of September, 1950, John Costello was appointed Trustee of the estate of the Bankrupt above named and ever since has been and now is the duly appointed, qualified and acting Trustee of the estate of said Bankrupt.

That on the 18th day of January, 1951, said Trustee filed with me a Petition for an Order requiring C. N. Golden to turn over to him for administration in these proceedings the sum of Four Thousand Seven Hundred Fifty Dollars (\$4,750.00)

in the event a certain Conditional Sales Contract, hereinafter referred to, was found to be invalid or the sum of One Thousand Seventy-Four Dollars (\$1,074.00) in the event said contract was found to be valid.

That in said Petition the Trustee alleged that at the time of the filing of the Petition in Bankruptcy, the Bankrupt was in possession of the furniture, fixtures and equipment of a restaurant at 1819 University Avenue, Berkeley, which property was being purchased by said Bankrupt from C. N. Golden and that subsequent to the filing of the Petition in Bankruptcy and in the month of October, 1950, the Bankrupt turned the property over to said C. N. Golden who thereafter sold the same for the sum of Four Thousand Seven Hundred Fifty Dollars (\$4,750.00), and that at the time the property was turned over by the Bankrupt to said C. N. Golden, there was only a balance due on the purchase price in the sum of Three Thousand Six Hundred Seventy-Six Dollars (\$3,676.00). The difference between the balance due C. N. Golden at the time of the filing of the Petition in Bankruptcy and the amount which Golden received on his subsequent resale of the property was the sum of One Thousand Seventy-Four Dollars (\$1,074.00) referred to in the Trustee's Prayer.

In response to the Order to Show Cause, C. N. Golden filed a paper denominated "Answer to Petition for Trustee for Turnover Order and Petition for Reclamation of Assets Held by Trustee."

In this Answer, C. N. Golden alleged that he was

the vendor of a Conditional Sales Contract dated July 7, 1950, covering the furniture, fixtures and equipment of the restaurant hereinabove referred to, the Bankrupt being the vendee. He further alleged that although sixty days had expired since the adjudication in bankruptcy, the Trustee had not elected to assume the contract. He further alleged in his Answer that he had not made any money from the sale of the personal property, and he asked that the Petition of the Trustee be dismissed. He then alleged the same facts with the additional fact that as part of the Conditional Sales Contract, he undertook to lease the premises to the Bankrupt; that the Trustee had not elected to assume the lease; that he had spent more than \$1,000.00 to preserve and maintain the "premises and/or personal property located at the same address" and that he has received no money from the Trustee for the preservation of the assets. That under the laws of California, he had the right to declare the contract at an end and to retain all payments as liquidated damages. He then prayed that the Trustee be required to turn over to him possession of the property. (This Answer was filed approximately two months after C. N. Golden had sold the property to a third party.)

The issues raised by the Trustee's Petition and the Answer of C. N. Golden came on at the hearing on January 30, 1951.

After hearing the evidence and considering authorities, I made an Order on the 6th day of

March, 1951, directing C. N. Golden to turn over to the Trustee the sum of Five Hundred Ninety-Nine Dollars (\$599.00), said sum being the reasonable value of the personal property as represented by the resale price thereof, less the balance due C. N. Golden under his Conditional Sales Contract and less the brokerage commission paid by C. N. Golden on the sale.

Thereafter C. N. Golden filed a Petition to Review said Order and after the Trustee filed a Motion to Dismiss the Petition for Review, said C. N. Golden filed an Amended Petition for Review, which Petition is still defective in that the Order complained of is not attached thereto.

II.

The Facts

There was introduced into evidence as Golden's Exhibit No. 1 the Conditional Sales Contract dated July 7, 1950, wherein Golden was the vendor and Pagliaro the purchaser. The contract price was Four Thousand Seven Hundred Seventy-Six Dollars (\$4,776.00), payable \$100.00 a week with a reservation of title in the seller until the full purchase price was paid. The contract contained the additional provision that upon completion of the purchase, the seller will arrange a transfer of lease to the buyer. It contained the standard provision that in case of default, the seller would have the right to declare the contract at an end and take immediate possession of the property, in which

event all payments made thereon would be retained by the seller as liquidated damages. The contract did not contain any provision that time was of the essence.

Golden testified that he received no payments from Pagliaro after September 5, 1950, the date of the filing of the Petition in Bankruptcy and that at that time, approximately \$3,600.00 was still due him on the contract; that the Bankrupt remained in possession of the property until October 21, 1950, on which date Golden obtained possession pursuant to a writing which was introduced as Golden's Exhibit No. 2 and reads as follows:

"Effective at 8:00 p.m. October 21st, 1950, the undersigned C. N. Golden and his wife Jessie P. Golden intend to repossess the premises known as Skippy's Cafe located at 1819 University Ave., County of Alameda, Berkeley, California. Said C. N. Golden and wife Jessie P. Golden do not assume any responsibility for debts contracted for by Angelo Pagliaro and his wife before the effective date of 8:00 p.m. Oct. 21, 1950, or after it. Said C. N. Golden and his wife Jessie P. Golden hereby release Angelo Pagliaro and his wife from all weekly installment payments due C. N. Golden and his wife Jessie P. Golden on the Cafe known as Skippy's Cafe, 1819 University Ave., County of Alameda, Berkeley, California.

"Angelo Pagliaro and his wife do not assume any responsibility for debts contracted for by C. N. Golden and his wife Jessie P. Golden, before or

after the effective date of this agreement, which is 8:00 p.m. October 21, 1950.

“Understood and Agreed to:

“C. N. GOLDEN,

“C. N. GOLDEN,

“JESSIE P. GOLDEN,

“JESSIE P. GOLDEN,

“ANGELO PAGLIARO,

“ANGELO PAGLIARO,

“MRS. ANGELO PAGLIARO.”

That after the repossession of the property, he operated the business for about thirty days and then he sold it to Virgil Miller for \$4,750.00, \$2,000.00 in cash and the balance in installments. That he first learned of the pendency of the bankruptcy proceedings when he received from the Court the Notice of the First Meeting of Creditors which was mailed by the Court on September 13, 1950; that there was no writing between him and the Bankrupt other than the Conditional Sales Contract hereinabove referred to. That the first communication that he had from the Trustee was a letter from the attorneys for the Trustee dated December 29, 1950, wherein the said attorneys requested to see a copy of the Conditional Sales Contract and requested him to advise them the balance due at the time he took back the restaurant and the amount received by him from a resale of the restaurant. That he held the restaurant premises under a lease from a Mr. McClellan which ran for three years with rentals of \$86.00 a month. That

Mr. Pagliaro was paying this rent in addition to the \$100.00 a week payment on the contracts. That Pagliaro paid the rent to him and he paid the owner. That when he sold the restaurant to Virgil Miller, he paid a brokerage fee of \$475.00 to Inter-City Realty Company. That during the month he was operating the restaurant, it operated at a loss.

The witness Golden did not have his records in Court, and by stipulation it was agreed that he could furnish the Court with a statement of monies expended by him in the preservation of the property. The only statement furnished is forwarded with this Certificate.

C. N. Golden did not apply for leave of this Court to either repossess or resell the property.

III.

Findings

The undersigned Referee, after considering the evidence and the applicable authorities, makes the following findings:

1. That at the time of the filing of the Petition in Bankruptcy, the Bankrupt was in possession of the furniture, fixtures and equipment of the restaurant located at 1819 University Avenue, Berkeley.

2. That said furniture, fixtures and equipment were being purchased by said Bankrupt from C. N. Golden under a Contract of Conditional Sale on which there was a balance due as of the date of the filing of the Petition in Bankruptcy of \$3,676.00.

3. That on the date of the filing of the Petition in Bankruptcy and at all times thereafter herein mentioned, said furniture, fixtures and equipment were worth the sum of \$4,750.00.

4. That on the 21st day of October, 1950, C. N. Golden took possession of said fixtures and equipment from the Bankrupt without leave of this Court and approximately thirty days later sold the same for \$4,750.00.

5. That in making said sale C. N. Golden was required to pay a brokerage fee of \$475.00, for which commission he is entitled to credit.

6. That it is impossible to tell from any evidence offered what, if any, monies were spent by C. N. Golden in preservation of the personal property.

7. That the Trustee is entitled to recover from C. N. Golden the difference between the balance due on the Conditional Sales Contract at the time of the filing of the Petition in Bankruptcy, \$3,676.00, and the \$4,750.00 received by C. N. Golden from the resale of the property, to wit, the sum of \$1,074.00, less the brokerage fee of \$475.00, leaving a net profit received by C. N. Golden from the resale of the property without leave of this Court, in the sum of \$599.00.

IV.

Discussion of Applicable Law

The vendor in a Conditional Sales Contract is

only a secured creditor and his interest is essentially in obtaining the price.

Thus the Court stated in *Walker vs. Houston*, 215 Cal. 742, 746:

“In our opinion, there is no doubt but that the title of the conditional seller is an ‘incident’ of the obligation to pay the balance of the purchase price, which is discharged upon a tender of said balance. It is true that the cases previously cited deal with liens. Nevertheless, the title reserved by a conditional seller for the purpose of securing payment of the purchase price is no less an incident of an obligation to pay money than a mortgage or pledge. The title is reserved for security only. The buyer has the full right of possession and use unless he defaults, and may secure title by performance of his obligation without any further assent by the seller. The sole interest of the seller is in the receipt of the price, and his reserved title cannot be used for any other purpose. Hence it follows that tender of the balance of the price should have the effect of discharging the title of the seller and vesting such title in the buyer, and it has been so held.” (Underscoring ours.)

California courts have held that where time is not of the essence, the buyer may reacquire the property from the seller after repossession.

In *Liver vs. Mills*, 155 Cal. 459, 462, the Court stated:

“It has been held in this State, that where the Vendor, in case of a Conditional Sale, retakes possession pursuant to the terms of the Contract, the defaulting Vendee may still complete the pur-

chase and perfect his right to receive the property by paying the balance due. (Miller vs. Steen, 30 Cal. 407). This upon the theory that a mere delay in the payment of money is ordinarily 'capable of exact and entire compensation' and will not, unless time has expressly been made of the essence of the obligation, bar the right of the party in default to tender payment, with interest, at a later date, and demand performance of whatever obligation was due him upon such payment."

In this case, time was not made of the essence, so there would apparently be no objection to Bankrupt or to his Trustee paying the seller the price after a proper repossession. Yet, in this instance, the repossession was improper in that it occurred after the filing of the Petition. In such instance, a Petition for Reclamation is the proper method of repossession and no citation of authority is needed for the proposition that the Petition for Reclamation must be granted before the creditor may repossess the property. In all events, as the Petitioner cannot take advantage of his own wrong, the case may be viewed as if the Trustee possessed the property and the Petition for Reclamation had been filed. Under the cases cited above, the interest of the seller under a Conditional Sales Contract being in the price, it is proper that the Trustee may tender the balance due to the seller.

As the seller by his acts has sold the property and has thus obtained that which the Trustee would have tendered to him, it is proper that with a deduction for the expenses of the sale, the Petitioner must remit the excess over the balance due on the

contract to the Trustee. This, he was ordered to do in the Turn Over Order.

The provisions of Section 70(b) of the Bankruptcy Act requiring a Trustee to accept or reject executory contracts within sixty days of the adjudication, do not cover a Conditional Sales Contract and all that remains to be done is the payment by the vendee-bankrupt. Such a contract is not "an executory contract" within the meaning of that Section. In the case of *In Re San Francisco Bay Exposition* (43), 50 F. Supp. 334, Judge Goodman of the District Court for the Northern District of California states as follows:

"The Referee assumed that any contract not completely performed by either party is executory in the sense which gives rise to the right of disaffirmance. Upon that assumption he held that the Building and Loan Commissioner could disaffirm the subscription agreement, because even though the Exposition had performed, the Commissioner had not; ergo, the contract was executory and the Commissioner could disaffirm. In a literal sense, executory contracts are, of course, those wherein performance in whole or in part has not been had. Upon that general premise, without further distinction, the Referee bottomed his decision. In the sense used in both the California statute and the Bankruptcy Act, they (i.e., executory contracts), are the type of contracts which call for performance in futuro, such as leases, contracts for electric power, light, heat, delivery of commodities, service and the like."

Further reference may be made to 4 Collier on Bankruptcy, page 1228. The authorities state:

“The legislative intent back of Section 70(b) and the purpose of the provision is to solve the problem of [assumption of liabilities]. It is conceivable that a system of bankruptcy law might compel the non-bankrupt party to a contract, the performance of which is incomplete as to both contracting parties, to continue performing while for the counterpart refer him to a mere dividend out of the estate. Needless to say, such a solution is neither wise from the view point of commercial credit, nor fair from the viewpoint of equity. It neglects one of the basic principles of equity, mutuality of obligation and performance. What Section 70(b) actually proposes to do is precisely to secure this continued mutuality wherever it is felt to be of greater benefit to the estate to proceed in accordance with the bankrupt debtor’s plans rather than to freeze his commercial relations as of the filing date.”

From the Exposition case and the foregoing citation from Collier, we may conclude that not every contract which might be technically classified as executory is included within the language of Section 70(b). The Section was designed to protect persons contracting with the Bankrupt from increasing their damage or loss by rendering or holding themselves to render performance of a contract with no reasonable expectation of receiving the return performance to which they are entitled. In this situation, the Trustee must advise them they will receive all that they are entitled to but must them-

selves perform, or if the Trustee does not, the law states that they need not perform.

In the situation, however, where the party has already performed, and would not be further damaged, there is no reason for acceptance or rejection by the Trustee. In spite of the fact that the contract is technically executory in that the vendee or his trustee have not paid, this is not the sort of contract contemplated by Section 70(b).

The vendor in a Conditional Sales Contract has performed when he delivers possession to the buyer in the first instance. He need execute no conveyance or Bill of Sale upon receipt of the price. Payment or tender by the buyer vests title in himself. This is true whether the payment be voluntary or through legal proceedings. *Casady v. Fry* (1931) 115, C.A. Supp. 778.

V.

Papers Sent Up

The undersigned Referee is forwarding with this Certificate the following papers:

1. Trustee's Petition for Turnover Order.
2. Order to Show Cause.
3. Answer to Petition of Trustee and Petition for Reclamation of Assets.
- 3a. Answer to Petition for Reclamation of Assets.
4. Turnover Order.
5. Amended Petition for Review of Referee's Order.

6. Transcript of Proceedings on January 30, 1951.

7. Golden's Exhibit No. 1.

8. Statement filed by C. N. Golden.

Dated: May 23, 1951.

Respectfully submitted,

/s/ BERNARD J. ABROTT,

Referee in Bankruptcy.

[Endorsed]: Filed May 23, 1951. Referee.

[Endorsed]: Filed May 24, 1951. U.S.D.C.

[Title of District Court and Cause.]

OPINION AND ORDER

One Angelo Pagliaro unsuccessfully operated a restaurant in Berkeley, California. Upon filing a voluntary petition in Bankruptcy he was adjudged bankrupt.

At the time he filed his petition, the bankrupt possessed the furniture, fixtures and equipment of the restaurant which he was purchasing from C. N. Golden pursuant to the terms of a conditional sales contract.

Following the filing of the petition the bankrupt turned the property over to Golden who sold it, for Four Thousand Seven Hundred Fifty Dollars (\$4,750.00). At the time the property was given to Golden the balance due on the purchase price was

Three Thousand Six Hundred Seventy-Six Dollars (\$3,676.00), the difference between the balance due Golden at the time of the filing of the Petition and the amount which he obtained on the resale being the sum of One Thousand Seventy-four Dollars (\$1,074.00).

Golden's position is that although sixty (60) days elapsed since the adjudication in Bankruptcy, the trustee had not elected to assume the conditional sales contract. He further contends that he made no money from the sale of the personal property and seeks dismissal of trustee's petition. He further alleged in his answer that under the laws of California he had the right to declare the contract at an end and to retail all payments as liquidated damages.

The referee in Bankruptcy ordered Golden to turn over to the trustee the sum of Five Hundred Ninety-Nine Dollars (\$599.00), which he determined to be the reasonable value of the personal property, represented by its resale price, less the balance due Golden under the Conditional Sales Contract and less the brokerage commission paid by Golden on the sale.

The Conditional Sales Contract dated July 7, 1950, was introduced into evidence as Golden's Exhibit No. 1. Therein Golden is denominated the vendor, and the bankrupt Pagliaro is buyer or purchaser. The contract called for the payment of Four Thousand Seven Hundred and Seventy-six Dollars (\$4,776.00), payable at One Hundred Dollars (\$100.00), a week title to be reserved in the vendor

until payment was made in full, at which time the vendor would request a transfer of lease to the purchaser. The customary provision regarding immediate possession upon default and retention of all payments prior thereto as liquidated damages is also therein contained. There was no provision that time was of the essence.

Golden received no payments subsequent to September 5, 1950, the date of the filing of the Petition in Bankruptcy. Approximately Three Thousand Six Hundred Dollars (\$3,600.00) was still due and owing as of that date. The bankrupt continued in possession of the property until October 21, 1950, at which time Golden repossessed the premises pursuant to an instrument in writing and operated the business for about thirty (30) days at the end of which he sold the business to one Miller for Four Thousand Seven Hundred Fifty Dollars (\$4,750.00), Two Thousand Dollars (\$2,000.00) in cash, the balance to be paid in installments.

Golden contended before the referee that he first learned of the Bankruptcy proceedings upon receipt by him of the Notice of the First Meeting of Creditors which was mailed by the Court on September 13, 1950. He further urged that he held the restaurant premises under a lease from one McClellan which ran for three (3) years at a rental of Eighty-Six Dollars (\$86.00) per month, which the bankrupt had been paying in addition to the One Hundred Dollars (\$100.00) a week payment on the Conditional Sales Contract.

The referee made findings, in accordance with

the facts as set forth herein, the most pertinent of which is that the trustee is entitled to recover from Golden the difference between the balance due on the Conditional Sales Contract at the time of the filing of the petition, i.e., One Thousand Seventy-four Dollars (\$1,074.00), less a brokerage fee paid by Golden in the amount of Four Hundred Seventy-five Dollars (\$475.00), thus leaving a net profit to Golden out of the resale of the property without leave of Court in the amount of Five Hundred Ninety-nine Dollars (\$599.00).

The findings are based upon the principle that a seller in a Conditional Sales Contract is nothing more than a secured creditor whose interest is essentially in obtaining the price. As stated in *Walker v. Houston*, 215 Cal. 742, 746: "There is no doubt but that the title of the conditional seller is an 'incident' of the obligation to pay the balance of the purchase price, which is discharged upon a tender of said balance. * * * The title is reserved for security only. The buyer has the full right of possession and use unless he defaults, and may secure title by performance of his obligation without any further consent by the seller. The sole interest of the seller is in the receipt of the price, and his reserved title cannot be used for any other purpose * * *"

In California a conditional sales contract of the kind here dealt with is valid without recording. Upon the buyer's default the vendor may at his option repossess the goods and retain all prior paid installments on the purchase price. Consent by the

conditional vendee to the retaking of possession by the vendor upon default is implied in the very form of the contract itself (*Goldberg v. List*, 11 C2d 389 at 393). Repossession alone, however, does not necessarily terminate the contract and if there is no agreement to the contrary, nor unreasonable delay, the defaulting vendee may still complete the purchase and perfect his right to receive the property by paying the balance due. "This upon the theory that a mere delay in the payment of money is ordinarily 'capable of exact and entire compensation,' and will not, unless time has expressly been made of the essence of the obligation, bar the right of the party in default to tender payment, with interest, at a later date, and demand performance of whatever obligation was due him upon such payment" (*Liver v. Mills*, 155 Cal. 459). In the immediate case nearly two months elapsed between initial default and repossession. Another month passed before the conditional seller in possession elected to sell the property. Even without the written agreement purporting to terminate the contract, it is clear that as between the buyer and seller the seller acted reasonably under the circumstances and if the conditional buyer were before this Court he would have no claim to the proceeds of the resale.

We are not directly concerned, however, with an evaluation of the rights of the parties to the original contract, but rather with the question as to whether the conditional seller was justified in extracting the property from the custody of the bankruptcy Court

without its assent and whether he may retain the proceeds from resale. The general rule that upon the filing of the petition the right, title, ownership and possession of the bankrupt as to his non-exempt property passes to the bankruptcy Court applies with equal force to the subject matter of a conditional sales contract. The contract is unaffected by the bankruptcy of the vendee and the vendor may reclaim the property unless the trustee elects to continue the contract within sixty (60) days provided by Section 70 b of the Bankruptcy Act. But the conditional vendor may not, after the petition in bankruptcy is filed, take the property from the bankrupt without the permission of the bankruptcy Court or through a reclamation proceeding. (See Matter of E. L. Trask & Co., Inc., [Ref., Mass.] 18 Am. B. R. [N.S.] 736; *In re Smith*, 18 F. 2d 797; Collier on Bankruptcy, 14th ed., § 70a [51]). Beneficial ownership and the right to acquire legal title may be of considerable value, and the trustee cannot be deprived of such "assets" by the unauthorized act of the conditional seller. It follows then that Golden, the conditional seller, had no right, either alone or pursuant to the meaningless consent of the bankrupt, to violate the custodia legis and repossess himself of the property here in issue. His conduct amounted to a technical conversion of the property. The trustee could have brought an action to recover possession or, in the event of resale, could have claimed the proceeds; but from September 5, 1950, to December 29, 1950, he did nothing, and the payments remained in default.

Section 70-b reads in material part as follows: “Within sixty days after the adjudication, the trustee shall assume or reject any executory contract, including unexpired leases of real property: Provided, However, That the Court may for cause shown extend or reduce such period of time. Any such contract or lease not assumed or rejected within such time, whether or not the trustee has been appointed or has qualified, shall be deemed to be rejected. A trustee shall file, within sixty days after adjudication, a statement under oath showing which, if any, of the contracts of the bankrupt are executory in whole or in part, including unexpired leases of real property, and which if any, have been rejected by the trustee * * *” (Emphasis added.) Applied to our problem, the section provides that although the trustee has the right to acquire title for the benefit of creditors, he is not obliged to. He may reject it as burdensome to the estate. Since the trustee did neither here, he seeks to avoid the force of the provision by arguing that this is not an executory contract within the contemplation of Section 70-b. He construes that section to apply only to instances where performance in future is owing on both sides. No authority was cited and none can be found which applies that restricted construction to the section. Collier, in his work on Bankruptcy, footnotes his statement that “the vendor may reclaim the property unless the trustee elects to complete the contract” to the appropriate paragraphs on executory contracts (14th ed., p. 1074 n. 31). Long before 70-b was promulgated the

right of a trustee to adopt or reject a conditional sales contract was recognized. (See *Bailey v. Baker Ice Mach. Co.*, 36 S. Ct. 50; *In re Wegman Piano Co.*, 221 F. 128; *Matter of Terrell*, 246 F. 743; *In re Burgermeister Brewing Co.*, 84 F. 2d 388; *In re White Plains Ice Service, Inc.*, 109 F. 2d 913; *In re Halferty*, 136 F. 2d 640; *Blakeley v. Hutchings*, 203 N.W. 86; 6 Am. Jur., p. 1133). The assumption of a contract entails the assumption of liabilities constituting expenses of administration and therefore a first charge upon the bankrupt's assets. It would be contrary to the spirit of the Act to force upon the creditors what might well be a white elephant, or, conversely, to permit a summary forfeiture of what might be a valuable right. On the other hand, it is consistent with the Act to invest the trustee with power to assume or reject the contract as he, in his judicious discretion, may deem most conducive to the prospective benefit of the estate. If, as happened here, sixty (60) days elapse without the trustee having made his election, the contract is deemed rejected, and the conditional seller may reclaim the property or, preferring to make the sale absolute, file a claim for the balance owing.

We thus are confronted, in this case, with the interesting spectacle of a trustee attempting to truncate his power of disaffirmance in order to force reimbursement. This he cannot do. Nor can he extend the time within which adoption may be made. Although the action of the conditional seller was irregular, it is the conclusion of this Court that

the trustee is barred from exploiting that technical wrong. He is conclusively presumed to have disaffirmed the contract and hence has no enforceable claim to the proceeds of resale.

The Order of the Referee is Reversed.

Dated July 23, 1951.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed July 23, 1951, U.S.D.C.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF
APPEALS UNDER RULE 73-(b)

Notice Is Hereby Given that John Costello, Trustee of the estate of Angelo Pagliaro, Bankrupt, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain Order made and entered in the above-entitled proceeding by Hon. Edward P. Murphy, Judge of the above-entitled court on the 23rd day of July, 1951, wherein and whereby said court reversed the Order, Judgment and Decree relative to Conditional Sales Contract by the Bankrupt and C. N. Golden, made and entered on March 6, 1951, in the above-entitled proceeding by Hon. Bernard J. Abrott, Referee in Bankruptcy, and from the whole of said Order of said District Judge so made and filed herein on the 23rd day of July, 1951.

Dated at San Francisco in the Northern District of California, this 6th day of August, 1951.

JOHN COSTELLO,

Trustee of the Estate of
Angelo Pagliaro,

By /s/ DANIEL R. COWANS,
One of His Attorneys.

[Endorsed]: Filed August 6, 1951.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL UNDER RULE 75(a)

To the Above-Entitled Court and to C. W. Calbreath, Esq., Clerk Thereof, and to C. N. Golden and to Messrs. Moran & Millspaugh, His Attorney:

Comes now John Costello, Trustee of the estate of Angelo Pagliaro, Bankrupt, Appellant herein, and in accordance with Rule 75(a) of the Federal Rules of Civil Procedure designate the following as the entire record, proceedings and evidence to be contained in the Record on Appeal. Notice of which said Appeal was heretofore filed herein on the 6th day of August, 1951, viz.:

1. Order Adjudicating Appellant Bankrupt.
2. Order Approving Trustee's Bond.
3. (Trustee's) Petition for Turnover Order together with Order to Show Cause thereon issued by Referee on January 18, 1951.

4. Answer of C. N. Golden to said last-mentioned Petition.

5. Answer of Trustee to Petition for Reclamation.

6. (Referee's) Turnover Order, dated March 6, 1951.

7. (Appellee's) Petition to Review Order of Referee and Amended Petition to Review Order of Referee.

8. Reporter's Transcript of Proceedings of January 30, 1951.

9. C. N. Golden's Exhibit No. 1.

10. Certificate and Report of Referee relative to Petition for Review of Referee's Order, dated May 23, 1951.

11. Opinion and Order of District Judge, dated July 23, 1951, Reversing Referee's Order of March 6, 1951.

12. (Appellant's) Notice of Appeal, dated August 6, 1951.

13. This Designation of Contents of Record on Appeal.

Dated this 22nd day of August, 1951.

Respectfully submitted,

SHAPRO & ROTHSCHILD,

By /s/ DANIEL R. COWANS,

Attorneys for Appellant, John Costello, Trustee of
the Estate of Angelo Pagliaro, Bankrupt.

[Endorsed]: Filed August 22, 1951.

In the Southern Division of the United States
District Court, for the Northern District of
California

No. 39166

In the Matter of
ANGELO PAGLIARO,

Bankrupt.

TRANSCRIPT OF PROCEEDINGS

Oakland, California, January 30, 1951—10:00 A.M.

Before: Honorable Bernard J. Abrott,
Referee in Bankruptcy.

Appearances:

SHAPRO & ROTHSCHILD, by
AUGUST B. ROTHSCHILD,
Attorneys for Trustee.

MORAN and MILLSPAUGH, by
PHILLIP M. MILLSPAUGH,
Attorneys for C. N. Golden.

HARRY GONICK,
Attorney for Bankrupt.

The Referee: Angelo Pagliaro. Petition in reclamation by the trustee and also petition in reclamation by the respondent, C. N. Golden, is that correct, gentlemen?

Mr. Millspaugh: That's correct, your Honor.

The Referee: Mr. Millspaugh represents Mr. Golden.

Mr. Millspaugh: That's correct.

The Referee: Mr. Rothschild represents the trustee and I see also present in court the attorney for the bankrupt.

Mr. Gonick: Yes, that's right.

The Referee: Although not a party to this proceeding.

Mr. Gonick: No. It was continued to today and that's why I am here.

The Referee: Very well.

Mr. Rothschild: Mr. Golden?

C. N. GOLDEN

called as a witness by the Trustee, being first duly sworn by the Referee, testified as follows:

By The Referee:

Q. What is your full name?

A. Clifford N. Golden.

Q. Clifford N. Golden, G-o-l-d-e-n?

A. That's right.

Direct Examination

By Mr. Rothschild: [1*]

Q. Mr. Golden, did you sell certain restaurant fixtures and equipment to Angelo Pagliaro, the bankrupt? A. I did.

Q. And was that pursuant to a written contract?

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of C. N. Golden.)

A. That's right.

Q. Have you that written contract?

A. Uh-huh.

Q. May I see it, please?

(The witness handed the paper to the trustee.)

Q. Now, the witness has handed me a paper denominated conditional sales contract, where C. N. Golden is described as the seller, Angelo Pagliaro as the buyer, bearing the date July 7, 1950, and recorded with the County Recorder of this county on July 12, 1950, Book 6161 Official Records, page 267. Now, on September 5, 1950, the property described in the conditional sales contract was located in the restaurant operated by Mr. Pagliaro?

A. On December 5th?

Q. September 5th.

A. No—I don't understand.

Mr. Rothschild: Will you read the question?

(The last question was read by the Reporter.)

A. Uh-huh.

The Referee: What is the answer?

The Witness: Yes, sir.

Q. And what was the balance due under the conditional sales contract at that time?

A. I believe it was Thirty-six Hundred. I had my book with me but laid it down and went off and forgot it. [2]

Q. Did you receive any payments from Mr. Pagliaro after September 5, 1950? A. No.

(Testimony of C. N. Golden.)

Q. Did you subsequently obtain possession of this property described in the conditional sales contract? A. Uh-huh.

Q. You have to answer so she can get it.

A. Yes, sir.

Q. And when did you get possession?

A. I believe it was November—about November 1st.

Q. And have you now possession of that property?

A. Pardon me, let me correct that answer. November 1st, that was September 1st, we discussed that. We operated one month and then sold it December 1st.

Q. Now, let's get this straight. You told me on September 5th Mr. Pagliaro had possession.

A. December 5th.

Q. September 5th.

Mr. Millspaugh: Refresh your memory here.

A. I believe that's right. I don't just remember the date, you see.

Q. Well, if counsel knows the date, I'll take counsel's date.

Mr. Millspaugh: No, I don't know the date either; there is a notice of intention to perhaps here.

The Referee: Off the record, gentlemen. Mr. Golden, is that Mrs. Golden sitting there?

The Witness: Yes.

The Referee: She said that she believes October

(Testimony of C. N. Golden.)

23rd [3] was the date that you repossessed it, is that correct, Mr. Golden?

The Witness: She would know better than I would because she kept all the books.

The Referee: Are you willing to accept the statement that October 23rd was the date?

The Witness: That's right.

The Referee: Counsel, you have no objection——

Mr. Millspaugh: I have no objection to that.

Q. And what did you do with this property after you took possession on October 23rd?

A. We operated it thirty days.

Q. That's to about November 23rd then?

A. No, we operated until about November 25th, I believe, or 26th. I'm the poorest hand at remembering dates.

Q. And then what happened to the property?

A. I sold it.

Q. To whom?

A. Mr. Miller. I don't just remember his——

Mrs. Golden: Virgil Miller.

The Witness: Virgil Miller.

Q. For how much? A. Forty-seven Fifty.

Q. On contract?

A. Well, no, I got some down.

Q. How much? A. Two Thousand.

Q. Two Thousand Dollars down. When did you first learn [4] that Mr. Pagliaro had filed a petition in bankruptcy?

A. We got a notice from the bankruptcy court. I don't just remember what day it was.

(Testimony of C. N. Golden.)

Q. That's the printed first meeting notice?

A. Huh?

Q. That's the printed notice of the Court of the first meeting of creditors? A. I believe so.

Mr. Rothschild: That's all.

The Referee: Mr. Millspaugh?

Mr. Millspaugh: Unfortunately, Mr. Golden's books are at my office and——

The Referee: Well, as far as the Court is concerned, I would be willing to give you additional time to bring any records you want. I mean, if you prefer to have the matter continued.

Mr. Millspaugh: If it goes into a matter—I don't think we have to go into continuances because I think it is a matter of—although the trustee has no right in this money. We could bring the books back to show where Mr. Golden has spent money to maintain this place and to keep it up during the time that he had to repossess it.

The Referee: Counsel, what the Court wants to know is whether or not you are going to try the case piece-meal or submit it or are you going to take two chances?

Mr. Millspaugh: I suppose we don't have much choice. [5] We'll have to continue it until we get the books.

The Referee: You can still avail yourself of the examination of anyone else you want here.

Mr. Millspaugh: The books are the main thing. It's a question of the money that was spent to preserve the property. Mr. Golden didn't have——

(Testimony of C. N. Golden.)

The Witness: I couldn't remember it now. Could you remember that, Mother? She kept all the books. She might remember. Could you?

Mrs. Golden: Well, I know it was between Five Hundred Dollars and a Thousand Dollars but I can't remember.

Mr. Millspaugh: You would have to remember each itemized bill, I imagine, wouldn't you?

Mrs. Golden: No, I can't.

Mr. Millspaugh: I'll start out here.

Cross-Examination

By Mr. Millspaugh:

Q. Is this your signature on this conditional sales contract? A. Uh-huh, that's right.

Q. Is that the signature of Mr. Pagliaro (indicating)? A. That's right.

Q. Did you see him sign there? A. I did.

Q. All right if I introduce this?

Mr. Rothschild: Go ahead.

Mr. Millspaugh: I wish to introduce this in evidence, your Honor. [6]

The Referee: Very well. Exhibit No. 1 in evidence.

(The paper referred to was received by the Referee and marked "Respondent's Exhibit No. 1 in Evidence.")

(Testimony of C. N. Golden.)

C. N. GOLDEN'S EXHIBIT No. 1

Book 6161 Page 269

AE60494

Conditional Sales Contract

Agreement made this 7th day of July, 1950, by and between C. N. Golden of Berkeley, California, party of the first part, hereinafter referred to as the seller, and Angelo Pagliaro of Berkeley, California, party of the second part, hereinafter referred to as the purchaser,

Witnesseth:

First. That the seller is the owner of the existing lease upon those certain store premises at 1819 University Avenue, Berkeley, California, formerly known as Dettmer's Coffee Shop, and seller is also the owner of the name and good will and the inventory hereinafter set forth of the business formerly operated in said premises.

Second. That the seller sells to said buyer the following described property, to wit:

The name, "Dettmer's Coffee Shop," the good will, and the following described personal property:

- 1 Horseshoe Counter
- 18 Stools
- 1 Cash Register (National)
- 2 Pie Cases
- 1 Center Bar
- 2 Exhaust Fans

(Testimony of C. N. Golden.)

Exhibit No. 1—(Continued)

| | |
|----|--------------------------------------|
| 2 | Hat Racks |
| 1 | Electric Water Cooler |
| 1 | Electric Clock |
| 1 | Meat Block |
| 1 | Range |
| 1 | Range Hood—7 Vent Pipes |
| 1 | Refrigerator (20-foot) |
| 1 | Steam Table |
| 8 | Steam Table Insets (stainless steel) |
| 8 | “ “ lids |
| 1 | “ pan |
| 1 | Double Sink |
| 1 | Grease Trap |
| 1 | Scrap Table |
| 1 | Work Table |
| 2 | Flour Cans |
| 1 | Flour Barrel |
| 6 | Stone Jars |
| 1 | Meat Grinder |
| 1 | Venetian Blind |
| 1 | Scale |
| 1 | Scrub Bucket and Mop |
| 3 | Garbage Cans |
| 48 | Grill Plates |
| 46 | Dinner Plates |
| 30 | 12" Platters |
| 42 | 5" Plates |
| 40 | 4" Plates |
| 35 | Dessert Dishes |
| 45 | Cups |

(Testimony of C. N. Golden.)

Exhibit No. 1—(Continued)

- 35 Saucers
- 60 Butter Chips
- 35 Creamers
- 4 Cream Pitchers
- 83 Forks (stainless steel)
- 78 Knives (stainless steel)
- 52 Soup Spoons (stainless steel)
- 76 Teaspoons (stainless steel)
- 4 Vinegar and Oil Bottles
- 60 Water Glasses
- 8 Juice Glasses
- 6 Syrup Pitchers
- 6 Egg Cups
- 30 Soup Plates
- 6 Napkin Holders
- 12 Salt and Pepper Shakers
- 6 Sugar Bowls
- 6 Station Brackets
- 1 10-gallon Stock Bottle
- 1 5-gallon “
- 2 6-quart Sauce Pan
- 3 4-quart “
- 1 China lap. 1 Copper Funnel
- 2 4-gallon Bottles
- 1 Dish pan (stainless steel)
- 3 Roasting pans
- 4 Dippers
- 1 Skimmer
- 9 Large Spoons
- 2 Whips

(Testimony of C. N. Golden.)

Exhibit No. 1—(Continued)

- 3 Enameled pans (oblong)
- 7 Frying pans (assorted sizes)
- 9 Granite pans “
- 1 French-fry Pvt.
- 1 Potato Masher

In addition, upon completion of this purchase, the seller will arrange a transfer of the lease upon said premises to the buyer. The consideration of this sale is the sum of \$4,776.00, to be paid by the buyer, \$100.00 or more on Monday of each week beginning July 10, 1950.

Third. That said buyer shall and will pay for said property the said sum of money at the time and in the manner above mentioned at Berkeley, California.

Fourth. That the title to said property and right of possession thereto shall be and remain in said seller until said sum of \$4,776.00 shall be paid in full, although the conditional buyer shall also have the right of possession as long as he shall continue making the payments hereinabove provided for. In addition, the buyer shall pay all rent and utility service, and other services furnished to said premises.

Fifth. That in case of default in any of the payments when due, as above specified, the seller shall thereupon forthwith have the right to declare this contract at an end, and to take immediate possession of said above described property, and in such case the said property, as well as all payments which

(Testimony of C. N. Golden.)

Exhibit No. 1—(Continued)

shall have been made hereon, shall belong to and be retained by said seller as liquidated damages for nonperformance of this contract on the part of said buyer, and for use of and injury to said property.

Sixth. That said buyer shall not sell, transfer or dispose of the above-described property without the written consent of the seller.

In the event of any legal action upon this contract by the seller, the buyer will pay all expenses of the seller, including attorney's fees and Court costs.

In Witness Whereof, the parties hereto have executed this agreement in duplicate the day and the year first above written.

/s/ C. N. GOLDEN,

Party of the First Part.

/s/ ANGELO PAGLIARO,

Party of the Second Part.

State of California,

County of Alameda—ss.

On this 7th day of July, 1950, before me, a Notary Public in and for the County of Alameda, State of California, residing therein, duly commissioned and sworn, personally appeared C. N. Golden, known to me to be the person that executed the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my

(Testimony of C. N. Golden.)

Exhibit No. 1—(Continued)

hand and affixed my Official Seal the day and year in this certificate first above written.

[Seal] /s/ ARTHUR BELLMAN,
Notary Public in and for the County of Alameda,
State of California.

[Stamped]: Recorded at request of R. A. Bellman, July 12, 1950, book 6161, page 269, Official Records of Alameda County, California.

Received January 30, 1951.

Q. At the time you entered into this contract, did you know whether or not the bankrupt, Mr. Pagliaro, was insolvent? A. No, I didn't.

Q. Did you have any thought at all to consider him insolvent? A. No, I didn't.

Q. At the time you entered into this contract, did you also enter into a contract or lease concerning certain restaurant and——

A. No, the lease went with the place.

Q. The lease went with the place. It went with this conditional sales contract.

A. That's right.

Q. Isn't that correct?

Mr. Rothschild: Counsel, may I interrupt there. He said no; then he said the lease went with him. Let's straighten it out.

Mr. Millspaugh: I think one of the clauses in there——

(Testimony of C. N. Golden.)

Mr. Rothschild: There is a reference in your contract to an assignment of a lease.

The Witness: Well, the lease went with the restaurant after it was paid for. It was to be transferred.

The Referee: Mr. Golden, other than this written document that has just been received in evidence, did [7] you sign any other written instrument with Mr. Pagliaro with reference to that?

The Witness: No, sir.

The Referee: None at all?

The Witness: No, sir.

The Referee: Did you sign a note?

The Witness: No, sir.

The Referee: Just this document?

The Witness: Just that contract.

The Referee: And you say your understanding was that after the payments were made on the equipment that then you were to enter into a written lease with Mr. Pagliaro, is that your answer?

The Witness: That's right, yes, sir.

The Referee: Pardon me, counsel.

Q. Is that correct, Mr. Pagliaro, that you advanced several payments on account of the rent on the premises? A. Yes, sir.

Mr. Rothschild: Just a second, I am going to object to that as incompetent, irrelevant and immaterial and not within the issues here.

Mr. Millspaugh: There is a question of—the basic question here is whether or not the witness here received anything of value from Mr. Golden.

(Testimony of C. N. Golden.)

In other words, consideration for consideration.

Mr. Rothschild: I'll concede right now that [8] I've seen the conditional sales contract. I'll concede that there was a valid conditional sales contract.

Mr. Millspaugh: All right.

Mr. Rothschild: On which, according to this witness' testimony there was \$3600 due at the date of the filing of the petition in bankruptcy, that thereafter, subsequent to the filing of the petition in bankruptcy and without leave of this Court, this witness took possession of the property subject to the conditional sales contract and resold it for \$4750. Now, those are the admitted facts, aren't they?

Mr. Millspaugh: Those are not all the facts.

Q. Mr. Golden, did you send a notice of default to Mr. Pagliaro concerning this conditional sales contract? A. That's right.

Q. Is this the notice that you sent to Mr. Pagliaro? A. That's right.

Q. Is that your signature there (indicating)?

A. That's right.

Q. Signature of your wife?

A. That's right.

Q. Is this the signature of Mr. Pagliaro?

A. That's right.

Q. Mrs. Pagliaro? A. That's right.

Mr. Millspaugh: I would like to introduce this in evidence, your Honor.

Mr. Rothschild: To the introduction of which document [9] the trustee objects on the ground it's

(Testimony of C. N. Golden.)

incompetent, irrelevant and immaterial, appearing on its face that it bears a date some month and a half after the filing of the petition in bankruptcy. It is a notice to the bankrupt and not to the trustee in bankruptcy.

The Referee: Objection overruled.

(The paper referred to was received by the Referee and marked "Respondent's Exhibit No. 2.")

The Referee: Off the record.

(Discussion off the record.)

Q. Mr. Golden, did you ever receive a notice from the trustee that he wants to assume the conditional sales contract, together with——

A. No, I didn't.

Q. None whatsoever. A. Not a bit.

Q. Did he ever tell you that he did desire to keep the contract, make payments to the lessor of the demised premises?

A. Well, we have had several talks but come to no agreement at all about him going ahead and keeping it. He just told me he couldn't pay for it——

Q. I mean the trustee in bankruptcy has told you he was going to go ahead and make payments on the rent on the premises there?

A. No; I'm sorry, I thought you meant Mr. Pagliaro. No, I never received anything from this but the one letter that someone wrote me to send in the contract and deal that we made on it which

(Testimony of C. N. Golden.)

we did. That's all we have ever heard from [10] them.

Mr. Rothschild: That's a letter from me, is that correct?

The Witness: Well, I guess it was.

Q. Do you have a copy of that letter?

The Referee: And when you say "that," Mr. Millspaugh, that is in addition to the notice of the bankruptcy proceeding that you received. You also received a notice from this court?

The Witness: That's right.

The Referee: Notifying you that Angelo Pagliaro had filed a petition in bankruptcy.

The Witness: Yes, sir. I can say this much. A man can get in lots of trouble trying to help somebody unbeknownst it to him. I only did that for him, just to help him.

Mr. Millspaugh: Here is a copy of the letter that was sent to you on December 29, 1950, Mr. C. L. Golden, Dear Mr. Golden——

The Witness: Oh, yes, that's right.

Mr. Millspaugh: Does the Court have a copy of this?

The Referee: No, I have never seen it counsel.

Mr. Millspaugh: I would like to put that in evidence to show that——

(Mr. Millspaugh handed the paper to the Referee.)

The Referee: Letter dated December 29, 1950, addressed to Mr. C. L. Golden, 1700 San Pablo

(Testimony of C. N. Golden.)

Avenue, [11] Berkeley, California, signed, very truly yours, August B. Rothschild, for Shapro & Rothschild, copy of a letter—Exhibit 3.

(The paper referred to was received by the Referee and marked “Respondent’s Exhibit No. 3.”)

Q. Mr. Golden, did you have a lease on the premises in question—restaurant there?

A. Yes.

Q. Who was the lessor—the party that leased it to you? A. What’s that guy’s name?

Mrs. Golden: McLellan.

A. Yes, McLellan.

Q. And what type of lease did you have? How long was it? A. Three years.

Q. And what were the payments to be made under that lease?

A. Eighty dollars a month.

Q. Eighty dollars a month. Did the bankrupt, Mr. Pagliaro, promise to make those payments when he went into possession of the restaurant?

A. That’s right.

Mr. Rothschild: Just wait a second. I object on the ground that the contract itself is the best evidence.

Mr. Millspaugh: That is with reference to the third-party here.

Mr. Rothschild: No, but you asked what the bankrupt agreed to do.

The Referee: Read the question, please.

(Testimony of C. N. Golden.)

(The last question was read by the [12] Reporter.)

Q. Who was paying the rent?

The Referee: Just a minute, counsel. The record will be up in the air. Do you withdraw that question?

Mr. Millspaugh: I'll withdraw that question.

The Referee: Very well.

Q. Who was paying the rental at the time Mr. Pagliaro went into possession?

A. He was. Mr. Pagliaro is what I mean now when I said he.

The Referee: What is that, Mr. Golden?

The Witness: Mr. Pagliaro is who I mean when I said he.

Q. Did that money that was paid to the lessor come out of the Hundred Dollars which was paid to you every week?

A. No. He was to pay me a Hundred Dollars a week and then pay the rent on top of it.

Q. I see.

The Referee: Let me interrupt a minute, counsel.

Q. (By The Referee): Did Mr. Pagliaro, when he would make the payments, did he give you a Hundred Dollars himself and then would he also give you Eighty Dollars rent and then you, in turn, paid the owner of the property?

A. That's right.

(Testimony of C. N. Golden.)

Q. Mr. Pagliaro didn't pay the owner of the property direct? A. No, sir.

Q. (By Mr. Millspaugh): After Mr. Pagliaro was adjudicated a bankrupt on or [13] about September 5th, to your knowledge did Mr. Pagliaro make any more payments on the lease in question?

A. No, he didn't.

Q. Did you make any payments on the lease?

A. Yes.

Q. Have you made those payments to date?

A. To date, until I sold it. You know about it—until I sold it.

Q. The present buyer is continuing to make the payments. A. That's right.

Q. If you hadn't made those payments on the lease, would you have forfeited your rights on the lease? A. That's right.

Q. Did you make any payments on the lease yourself during the time that Mr. Pagliaro was in possession of the premises?

A. Paid the first month.

Q. And how much was the first month?

A. Eighty Dollars, and then I paid the last month that he was there. He didn't pay the rent and——

Q. That was about approximately how much?

A. Eighty Dollars.

Q. Did you make advances to Mr. Pagliaro during the time he was in possession for the purchase of food or equipment?

(Testimony of C. N. Golden.)

A. I stood for it and then paid later after he was gone.

Q. Approximately how much did you advance to him for the purchase of food?

A. Altogether? [14]

Q. For the purchase of food.

A. Eighty Dollars at one place.

Q. Approximately how much did you spend on light fixtures to improve the place?

A. One Hundred Fifty Dollars on lights, Thirty-six Dollars on electricity, watt being a 210.

Q. Did you advance any other money for improvement of his restaurant while Mr. Pagliaro was in possession?

A. Yes, I believe there was \$150 to Peter Wilson for equipment.

Q. That equipment went into the leased premises, is that right? A. That's right.

Q. Is there anything else that you spent to improve the premises?

A. Well, I tell you, it's hard for me to remember. I had it all in that book. I did fix the floor—

The Referee: Just a minute, counsel. Counsel, as far as the Court is concerned, even if your theory is correct, it would appear to me that I'll have to know something about when this money was spent. We have a date of cleavage here, September 5th, when the petition in bankruptcy was filed.

Mr. Millspaugh: Yes, sir.

The Referee: And it's entirely possible that some of these monies that Mr. Golden is speaking

(Testimony of C. N. Golden.)

about that he spent were spent after bankruptcy. For instance, he [15] said he paid the last month's rent. As I recall, Mr. Pagliaro, when he was examined here at the first meeting of creditors, he was still operating the restaurant unbeknownst to the Court or anyone else. We have different matters to consider here and as long as he does have—You have books, do you not?

The Witness: Oh, yes, and bills. I had it all and we left it laying in his office.

Mr. Millspaugh: Suppose we continue it over then.

The Referee: Off the record.

(Discussion off the record.)

Mr. Millspaugh: There is one other question here, too. He spent——

Q. When you sold these premises for the second time, you paid a broker's fee, is that not correct, for the sale of the property?

A. Four Hundred and Seventy-five Dollars.

Q. Four Hundred and Seventy-five Dollars.

The Referee: Mr. Rothschild, if Mr. Golden has to return with his books, did you want to be able to cross-examine up until then?

Mr. Rothschild: Well, I would just as leave ask a couple of questions now and possibly, if counsel gives me a statement showing the amounts and dates over counsel's signature, I'll accept them if counsel will vouch for them.

Mr. Millspaugh: All right, fine. [16]

Q. (By Mr. Rothschild): Just this one ques-

(Testimony of C. N. Golden.)

tion: This \$475, did that come out of the Forty-seven Fifty or was that on top of it?

A. I didn't understand.

Q. Was the \$475 deducted from the \$4750?

A. That's right, as a commission for the real estate man.

Q. And who was the real estate man?

A. Claudenos. I may have one of his cards. Here you are—C-l-a-u-d-e-n-o-s of the Inter-City Realty Company.

Q. Now, Mr. Golden, when you took over on or about October 23rd, was there any foodstuffs on hand?

A. Well, some, but very little.

Q. Did you pay for those or just take them?

A. Well, we just let them go back—I didn't pay for nothing.

Q. And during the period that you operated the restaurant did you operate it at a profit or at a loss?

A. On a loss. Even if I would count my wages or my wife's wages or anything, I would lose plenty because we didn't count our wages. We didn't break even on what we were actually doing.

Mr. Rothschild: I would suggest then that the matter stand over and if I get a statement in a proper form—I am reserving all questions as to admissibility of the statement. I want a statement first instead of bringing Mr. Golden back.

Mr. Millspaugh: There is no reason why we can't go [17] into the law now and argue it here.

(Testimony of C. N. Golden.)

I would like to argue it now and save ourselves some time, I think.

The Witness: I would like to get it over with if you allow me to say anything because I unfortunately got into this thing, good gracious, trying to help someone—didn't know anything about it either.

The Referee: You won't have to return, Mr. Golden; you can step down.

The Witness: Thank you.

The Referee: The matter is submitted. Counsel, do you want to argue it now?

Mr. Rothschild: It's agreeable to me, your Honor.

The Referee: And it's stipulated by counsel on both sides, in lieu of bringing Mr. Golden back, that counsel for Mr. Golden will examine the books and records and furnish Mr. Rothschild with a statement as to what the books and records show. Is that satisfactory?

Mr. Rothschild: That's right, and that I reserve all rights as to the admissibility of the——

Mr. Millspaugh: That's correct.

The Referee: But no one is making any objections to Mr. Golden not being here and testifying as to what those records show.

Mr. Rothschild: That's right.

The Referee: We have a peculiar situation, gentlemen, [18] here. You are both petitioners, so as far as Mr. Rothschild is concerned, you are the original petitioner.

Mr. Rothschild: I think the trustee's petition is

very clear, that on September 5, 1950, John Costello became the owner of certain restaurant fixtures and equipment subject to conditional sales contract, that thereafter, one C. N. Golden, with full knowledge of the pendency of the bankruptcy proceeding without the consent of this Court, converted the trustee's equity in the fixtures and according to our petition which gives him the break, he said on the stand \$3600, and our petition, using the figure that he gave me in a letter of \$3676, that he took that property and thereafter sold it and converted it to his own use, a profit of \$1074, which was presumably the amount the trustee would have received from the sale of the property, had not this court been ignored. And that's solely and simply our position, that nothing has anything to do with rent, unsecured debts or other accounting between the parties has any materiality, that the sole question, is the amount due on this conditional sales contract. This wasn't a chattel mortgage given as security for miscellaneous indebtedness, but was merely security for the purchase price. While my prayer is in the alternative, I am waiving that part of [19] the prayer which asks \$4750 and stand solely on \$1074.

The Referee: Counsel?

Mr. Millspaugh: Finished? Well, in the first place, I think it is conceded this was a conditional sales contract. Now, let's take the position where a man—first of all, before a man is adjudicated a bankrupt, there is no question there that under conditional sales contract, you can forfeit buyer's

rights thereunder, there not being preference under Section 60 of the Bankruptcy Act. Now, it comes down to a point where a man has been adjudicated a bankrupt and he does the same thing. All right, there are two things that happen in that respect. As you said before, the trustee takes over the property. Now, the trustee just can't let that property sit there and not do anything about it. It costs money to keep property sitting around under the Bankruptcy Act. The trustee has to act himself, and under Subdivision B of Section 70 of the Bankruptcy Act, reads "within sixty days after the adjudication, the trustee shall assume or reject any executory contract, including unexpired leases of real property." I think the theory here with the trustee to Mr. Golden will show that he had full knowledge of an executory contract or that sixty days has elapsed since then, no notice of this contract has been given to the trustee and under those grounds the [20] trustee cannot come in here now months later and say, well, we want the money back from the property here. Actually, Mr. Golden made no profit on it at all; he spent money to preserve the asset and it cost him money to keep it going during the time the man went bankrupt. He sold the property, he received a small down payment on it and the rest of the money would be paid off in the future. Even though the trustee has title to the property, Mr. Golden has a right to declare a forfeiture of the actual trustee. That right is the right of the contract he entered into originally with the bankrupt. That right is protected up to the time

of the adjudication. It's protected after the sixty-day period, too. In this case here, Mr. Golden didn't deliberately sell the property; it is one of these cases where he didn't have knowledge of the bankruptcy laws. What else could he do actually? He had no choice but turn around and sell it. If he didn't sell it, the property would be lying there now and he would be liable. He would have been worse off now than he is actually. Actually, he did the only thing he could do—sell the property and try and cut his loss down as low as possible. He has really lost money on the deal; he hasn't made money on the deal. Now, it is my understanding that this Thousand Dollars that Mr. Rothschild is talking about here is the Thousand Dollars [21] that he made prior to the time he received under bankruptcy, is that correct?

Mr. Rothschild: No, this \$1074 is the difference between \$3676——

Mr. Millspaugh: \$3676?

Mr. Rothschild: Which Mr. Golden advised me on the stand—he said \$3600 in his letter to me—that \$3676 was due him from the conditional sales contract—due him under the conditional sales contract and \$1074 is the difference between that sum and the sum which Mr. Golden received from the sale of the trustee's property.

Mr. Millspaugh: You are forgetting the brokerage fee too in there; that's about \$500.

Mr. Rothschild: The trustee in bankruptcy could have sold that property in court; we don't make brokerage fees.

Mr. Millspaugh: According to the law here, you let sixty days elapse. What you should have done was gone ahead and sold the property, give him notice that you were going to continue on it. You can't expect Mr. Golden to go ahead here and pay the lease on the property and pay all the bills on it while you sit back and do nothing and that's exactly the reason why this subdivision was put in there. Mr. Golden had no choice in the matter. He has made no money on the [22] transaction at all. He has a right to declare the contract at an end when he has done that. This petition of mine here is to allow him to reclaim his asset from the trustee. If the trustee has any title whatsoever, I think it should be returned back to Mr. Golden.

The Referee: When did Mr. Golden sell the property—'47?

Mr. Millspaugh: About November something—November 25th, the man was adjudicated a bankrupt—September 5th—more than sixty days.

The Referee: The trustee wasn't elected though on that date was he?

Mr. Millspaugh: It says here within sixty days after the adjudication, quoting from Subdivision B of Section 70 of the Bankruptcy Act. I don't think it has been changed.

The Referee: Anything further, gentlemen?

Mr. Rothschild: No, except this one statement I would like to make, your Honor. I think the trustee necessarily must concede liability for the reasonable storage value on the property. I think at the

time of the sale, because if the trustee had conducted a sale, he would have been responsible.

Mr. Millspaugh: I think it also must be conceded that these types of businesses are not easy to sell and [23] even if the trustee had to go ahead to have tried to have sold it, he would not have gotten that much money on it. He himself would have undoubtedly hired a broker and paid the usual percentage that is paid to a broker.

Mr. Golden: Another thing, I painted it, too, put a ventilator fan in.

Mr. Rothschild: Submitted.

Mr. Millspaugh: I submit it.

The Referee: Counsel, you send those statements to Mr. Rothschild.

Mr. Millspaugh: All right, fine.

The Referee: And also get from Mr. Golden the exact payments with reference to the chattel mortgage or conditional sales contract.

Mr. Millspaugh: You mean, made by the bankrupt?

The Referee: Yes, made by the bankrupt to Mr. Golden. There seems to be some confusion in the mind of maybe your client, so as long as he has the books, he can get the exact figure.

Mr. Millspaugh: All right, fine.

Mr. Rothschild: In other words, in the letter he wrote me, counsel, he said that the balance due him was \$3676; on the stand he said \$3600.

Mr. Millspaugh: I don't think we can dispute that.

The Referee: Get the figures, as long as you are [24] submitting it.

Mr. Millspaugh: All right, fine.

The Referee: Submitted.

Mr. Gonick: Now, your Honor, still continued——

Mr. Rothschild: Let me ask you this. What is your man prepared to do now on the stock in trade that he used?

Mr. Gonick: Well, I believe that—How much was his interest now—a Hundred Dollars?

Mr. Rothschild: We have got all different kinds of figures. About Three Hundred Dollars and——

Mr. Golden: I don't know anything about that.

Mr. Rothschild: Here is a man who kept no inventory. We have just got to guess. We know from going over his bills that he made substantial purchases of meat.

Mr. Gonick: Well, I don't think they were kept for more than twenty days. I mean, the nature of the business is such that no restaurant man—He's here; you can put him on the stand again.

Mr. Rothschild: I will say this, counsel, after hearing your witness on the stand, I am prepared to make a petition and put the burden on you to come in and show what he has done. Here is a man that has just flaunted the Bankruptcy Act, gone on operating——

Mr. Gonick: Have you seen the restaurant? It's about half as big as this room here. [25]

The Referee: Mr. Gonick, the only matter be-

fore me is continued examination of the bankrupt and he is here.

Mr. Rothschild: Take the stand, Mr. Pagliaro.

ANGELO PAGLIARO

the bankrupt herein, having been previously sworn by the Referee, testified as follows:

Direct Examination

By Mr. Rothschild:

Q. Mr. Pagliaro, since the last examination, have you ascertained any additional facts with reference to your former businesses in Los Angeles?

A. No, sir.

Q. Where are copies of the income tax returns filed by you for the last three years?

A. Well, I had them at my previous home.

Q. You mean, in Los Angeles?

A. 8821 South Haas.

Q. That's the last time you saw them?

A. That's right.

Q. And your income tax returns were filed with the Collector of Internal Revenue at Los Angeles.

A. Yes, sir.

Q. When is the last time you filed income tax return? A. '48.

Q. '48? A. 1948.

Q. That was filed in '49?

A. No, I didn't file for 1949. [26]

Q. No, that was filed in 1949.

A. Oh, yes, sorry.

(Testimony of Angelo Pagliaro.)

Q. In other words, during 1948, did you have an income? A. Yes, sir.

Q. And during 1949, did you have any income?

A. Well, all this came up in '49.

Mr. Gonick: When you are referring to income, you mean a net income, I assume.

Mr. Rothschild: I think the form of return calls for a gross income of \$5000.

Q. Did you have a loss for the year 1949?

A. 1949, everything was so mixed up, I don't know anything that happened in 1949, except that I borrowed money from the race track try to come out that way. You fellows have a record of that; you know all that.

Q. I don't know that I have heard you say that.

A. Yes, sir.

Q. You told us that you left the restaurants in Los Angeles and just left them there.

A. The sheriff had possession of the restaurants at the time I left.

Q. The sheriff had possession? A. Yes, sir.

Q. Do you know who sued you and in what action the sheriff was in possession?

A. I don't remember the sheriff's name but this California Vending Machine is the last one that was in there. Previous to [27] that it was——

Q. Do you know whether the sheriff sold the restaurants?

A. I don't know anything that happened after that.

(Testimony of Angelo Pagliaro.)

Q. You have never heard?

A. Never heard.

Q. You told us last time you believe your wife had the restaurants.

A. That's what I heard through my sister told me that. She is operating it. I didn't see it myself.

Q. That your wife operated it?

A. Yes, my first wife.

Q. Now, do I understand that your first wife owns one of the restaurants?

A. I don't know whether she does or not legally or what have you, but my sister told me she was operating it. She could be a waitress there for all I know.

Q. Now, at the time you filed—Withdraw that. During the month of August and September, what was the average amount of canned goods that you had on hand in this restaurant in Berkeley? I am speaking of August and September of 1950.

A. I still maintain I have to operate at least a Hundred Dollars or Two Hundred Dollars on hand and operate a business so——

Q. Is that canned goods now?

A. Canned goods and fresh meats and everything concerned feeding the public. That's standard inventory for a small place. [28]

Q. A Hundred Dollars or Two Hundred Dollars.

A. Well, anywhere from a Hundred to Two Hundred Dollars. It could be 125 or 150 or it could be a Hundred Dollars even.

(Testimony of Angelo Pagliaro.)

Q. And on September 5, 1950, how much cash did you have in the cash register?

A. I mean, that is the date of the filing of the petition.

Q. (By The Referee): Didn't you testify to that once before, Mr. Pagliaro?

A. Yes, sir.

Q. Didn't you say you had so much in the bank every morning?

A. Yes, sir.

Q. How much was that?

A. Well, we opened up with \$30 in change.

Q. That's what he wants to know. Now, did you have more than \$30 that day, do you know?

A. Well, my wife had all the money. I think she has testified to that.

Q. I am just asking you now.

A. Well, I don't remember; I don't know.

Q. You are just sure about the \$30 she had.

A. Yes, that's to open up with.

Q. (By Mr. Rothschild): Did you take any canned goods out of the restaurant?

A. We didn't take anything. That restaurant in Berkeley, we didn't take anything out of it; we took ourselves out of it.

Mr. Gonick: You mean any left at the restaurant. [29]

Q. Any left any time after September 5, 1950.

A. We didn't even take time to wash the dishes—right around six o'clock; right in the middle of dinner.

Mr. Gonick: It is conceded, of course, that he

(Testimony of Angelo Pagliaro.)

consumed the stock in the course of trade. There is no question about that.

The Referee: It must be now conceded he had certain assets belonging to the creditors that now belong to the trustee at the time he filed his petition in bankruptcy, too. He had Thirty Dollars in change and by his own testimony, to run that kind of a business, he had to have somewhere between One Hundred and Two Hundred Dollars worth of stock.

Mr. Gonick: I believe that would be necessarily conceded and it would have to be restored to the estate.

Mr. Rothschild: I am waiting to hear, right now, counsel, about what proposition your client is making about restoring this to the estate.

Mr. Gonick: Since I am speaking for him, whatever the Court finds that figure to be, and apparently there seems to be some leeway here, a finding will have to be made on it; we can't reach it by stipulation. It will be up to him to simply furnish that amount of cash to the trustee. I think there is no question about it. That's our offer.

The Referee: The Court actually did make his finding [30] somewhere between 130 and 230; I am accepting his lowest figure and \$30 in change, but I don't want to be in the position of being the bargainer. I think that you two gentlemen, knowing my feelings, ought to be able to get together as far as the bankrupt is concerned if he ever wants a discharge.

(Testimony of Angelo Pagliaro.)

Mr. Gonick: He will have to furnish that money. I have already advised the bankrupt whatever cash that belongs to the estate, he has got to make it good. Needless to say, it was perishable—I mean, except the canned goods. If he didn't sell it to the customers, it would be lost to the estate.

The Witness: Pardon me, Mr. Gonick, Mr. Golden had to pay for that stuff anyway. It was on credit. Mr. Golden states he paid for it after I left—that he even said that right in his chair a little while ago, the grocery bill was \$88 and so on and so forth, so we didn't actually own it. We didn't own it. We didn't pay for it. There was no money. If there was, I would be there making it right now, paying everybody off. I'm working twenty hours a day now; I can't get nowhere.

The Referee: Counsel, I'll continue this matter two weeks and in the meantime, you see to it that the bankrupt makes a payment to the trustee and if not, he is to return at that time, do you understand?

Mr. Gonick: Just a minute. I was just wondering if [31] we could somehow determine on the amount. I mean, this goods wasn't purchased on conditional sales contract, was it?

The Referee: He just mentioned it was sold on credit. Wasn't it sold on credit?

The Witness: Yes, sir.

The Referee: The title wasn't recorded in the seller.

Mr. Gonick: I can see there is a moral position there but I recognize that the law is not on our

(Testimony of Angelo Pagliaro.)

side. I would just like to ask my client, not necessarily on the record——

The Referee: I'll give you five minutes.

(Discussion off the record.)

Mr. Rothschild: We will stipulate, if your Honor please, that there was \$150 worth of merchandise on hand at the time of the filing of the petition and \$30 cash, a total of \$180. We ask that an order be made directing the bankrupt to turn that sum over to the trustee.

The Referee: So ordered. First meeting of creditors concluded?

Mr. Rothschild: Concluded.

The Referee: Is that satisfactory, Mr. Gonick?

Mr. Gonick: Well, it is as to the amount. However, it's going to take my client a little bit of time to get [32] that together.

The Referee: As far as that is concerned, you can work that out with the attorney for the trustee. Then you are satisfied with the——

Mr. Gonick: I am satisfied with the amount.

Mr. Rothschild: As far as concluding the matter, may it be understood, Mr. Gonick, if I need Mr. Pagliaro for further examination——

Mr. Gonick: You can have him.

The Referee: As far as the time element is concerned, it may be worked out by the counsel for the bankrupt and counsel for the trustee. In other words, it's not forthwith. [33]

State of California,
County of Alameda—ss.

I, Mary Ruth Kassabian, do hereby certify:

That I am the official reporter of the Bankruptcy Court; that on the 30th day of January, 1951, I fully, truly and correctly took down in shorthand writing all of the proceedings had in said court and cause at Room 1104, Tribune Tower, Oakland, Alameda County, California; and thereafter fully, truly and correctly transcribed the same into long-hand typewriting and that the foregoing pages 1 to 33, inclusive, are a full, true and correct transcript of my shorthand notes taken at the time and place therein stated.

In Witness Whereof, I have hereunto set my hand this 2nd day of May, A.D. 1951.

/s/ MARY RUTH KASSABIAN,
Reporter.

[Endorsed]: Filed May 7, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this court in the above-

entitled matter and that they constitute the record on appeal herein as designated by the parties:

Order of Adjudication and Reference.

Order Approving Trustee's Bond.

Petition for Turn-Over Order.

Order to Show Cause.

Answer to Petition of Trustee for Turn-Over Order and Petition for Reclamation of Assets Held by Trustee.

Answer to Petition for Reclamation of Assets.

Turn-Over Order.

Petition for Review of Referee's Turn-Over Order and Denial of Petition in Reclamation.

Amended Petition for Review of Referee's Turn-Over Order and Denial of Petition in Reclamation.

Referee's Certificate on Petition to Review.

Opinion and Order Reversing Order of Referee.

Notice of Appeal.

Designation of Contents of Record on Appeal.

One Volume Reporter's Transcript.

Golden's Exhibit No. 1.

In Witness Whereof, I Have Hereunto Set My Hand and Affixed the seal of said District Court at San Francisco, California, this 5th day of September, 1951.

[Seal]

C. W. CALBREATH,
Clerk.

By /s/ E. H. NORMAN,
Deputy Clerk.

[Endorsed]: No. 13082. United States Court of Appeals for the Ninth Circuit. John Costello, Trustee of the Estate of Angelo Pagliari, Bankrupt, Appellant, vs. C. N. Golden, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed September 5, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13082

JOHN COSTELLO, Trustee of the Estate of
ANGELO PAGLIARO, Bankrupt,
Appellant,

vs.

C. N. GOLDEN,

Appellee.

CONCISE STATEMENT OF POINTS TO BE
RELIED UPON BY APPELLANT ON AP-
PEAL

Comes now John Costello, Trustee of the Estate of Angelo Pagliaro, Bankrupt, Appellant herein, and in accordance with Rule 19(6) of the above-entitled Court specifies the following as a Concise Statement of Points, the points on which said Appellant intends to rely on the Appeal heretofore filed herein from the Order made and entered in the above-matter by Hon. Edward P. Murphy, Judge of the United States District Court on the 23rd day of July, 1951.

That certain Order of the said District Judge dated the 23rd day of July, 1951, wherein and whereby the Order, Judgment and Decree of Hon. Bernard J. Abrott, Referee in Bankruptcy, made in the above-entitled matter on March 6, 1951, was reversed, was and is erroneous and contrary to law in that

(a) A contract of Conditional Sale is not an

executory contract within the meaning of Section 70(b) of the Bankruptcy Act and, therefore, need not be assumed or rejected by the Trustee within sixty days after adjudication;

(b) That the bankrupt estate will suffer a loss in the nature of a forfeiture if the Appellee is permitted to retain an extra profit through his wrongful act of unauthorized self-help, and the case is a proper one for equitable relief from forfeiture, even if it should be determined that a contract of Conditional Sale is an executory contract within the meaning of Section 70(b);

(c) That the wrongful act of unlawful seizure of assets of a bankrupt estate deprives Appellee of the right to keep extra profits which he would not have realized except for said wrongful act.

Dated at San Francisco, California, this 11th day of September, 1951.

Respectfully submitted,

SHAPRO & ROTHCHILD,

By /s/ AUGUST B. ROTHCHILD,
Attorneys for Appellant, John Costello, Trustee of
the Estate of Angelo Pagliaro, Bankrupt.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 11, 1951.

[Title of District Court and Cause.]

DESIGNATION OF PARTS OF A RECORD
NECESSARY FOR CONSIDERATION OF
APPEAL UNDER RULE 19(6)

To the Above-Entitled Court and to Paul P. O'Brien, Clerk Thereof and to C. N. Golden and to Messrs. Moran & Millspaugh, His Attorneys:

Comes now John Costello, Trustee of the Estate of Angelo Pagliaro, Bankrupt, Appellant herein, and in accordance with Rule 19(6) of the Rules of the above-entitled Court designate the following as portions of the record, proceedings and evidence which said Appellant thinks necessary for the consideration of the Appeal heretofore filed herein on the 6th day of August, 1951; viz.:

1. Order Adjudicating Appellant Bankrupt.
2. Order Approving Trustee's Bond.
3. (Trustee's) Petition for Turnover Order together with Order to Show Cause thereon issued by Referee on January 18, 1951.
4. Answer of C. N. Golden to said last-mentioned Petition.
5. Answer of Trustee to Petition for Reclamation.
6. (Referee's) Turnover Order, dated March 6, 1951.
7. (Appellee's) Petition to Review Order of Referee and Amended Petition to Review Order of Referee.

8. Reporter's Transcript of Proceedings of January 30, 1951.

9. C. N. Golden's Exhibit No. 1.

10. Certificate and Report of Referee relative to Petition for Review of Referee's Order, dated May 23, 1951.

11. Opinion and Order of District Judge, dated July 23, 1951, Reversing Referee's Order of March 6, 1951.

12. (Appellant's) Notice of Appeal, dated August 6, 1951.

13. Designation of Contents of Record on Appeal filed with District Court.

14. Concise Statement of Points to Be Relied Upon by Appellant on Appeal filed herein.

15. Designation of Parts of the Record Necessary for Consideration of Appeal filed herein.

Dated at San Francisco, California, this 11th day of September, 1951.

Respectfully submitted,

SHAPRO & ROTHSCCHILD,

By /s/ AUGUST B. ROTHSCCHILD,

Attorneys for Appellant, John Costello, Trustee of the Estate of Angelo Pagliaro, Bankrupt.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 11, 1951.

No. 13,082

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JOHN COSTELLO, Trustee of the Estate
of Angelo Pagliaro, Bankrupt,

Appellant,

VS.

C. N. GOLDEN,

Appellee.

APPELLANT'S OPENING BRIEF.

SHAPRO & ROTHSCHILD,

155 Montgomery Street, San Francisco 4, California,

Attorneys for Appellant.

DANIEL R. COWANS,

155 Montgomery Street, San Francisco 4, California,

Of Counsel.

FILED

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No. 13,082

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JOHN COSTELLO, Trustee of the Estate
of Angelo Pagliaro, Bankrupt,

Appellant,

vs.

C. N. GOLDEN,

Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT AS TO JURISDICTION.

This appeal is from an order of the United States District Court for the Northern District of California, Southern Division (dated July 23, 1951) (T.R. 35-43), reversing an order of the Referee in Bankruptcy dated March 6, 1951 (T.R. 13-15), which required the appellee to turn over to the appellant, a Trustee in Bankruptcy, certain funds which the Referee determined belonged to the general creditors of the Bankrupt. On September 5, 1950, the Bankrupt filed a Voluntary Petition in Bankruptcy under the provisions of Chapters I-VII of the Bankruptcy Act, U.S.C., Title 11, Chapters 1-VII. Under an Order of Adjudication and Reference (T.R. 3-4), said

Bankrupt was on that day adjudicated bankrupt and the matter was referred to Hon. Bernard J. Abrott, Referee in Bankruptcy.

The case arose on a Petition for Turnover Order (T.R. 5-7) filed by appellant on January 18, 1951 with said Referee, the Answer to Petition of Trustee for Turnover Order and Petition for Reclamation of Assets Held by Trustee (T.R. 8-11) filed January 26, 1951 and the Answer to Petition for Reclamation of Assets (T.R. 12-13) filed January 30, 1951.

The United States District Court had jurisdiction under Section 23 of the Bankruptcy Act (Title 11, U.S.C., Section 46) to review the Order of the Referee on the Amended Petition for Review of Referee's Turnover Order and Denial of Petition in Reclamation (T.R. 18-21) filed pursuant to Section 39c of the Bankruptcy Act (Title 11, U.S.C., Section 67c).

The appellate jurisdiction of the Court is invoked under Section 24a of the Bankruptcy Act (Title 11, U.S.C., Section 47a), pursuant to a duly filed Notice of Appeal to Court of Appeals Under Rule 73-(b) dated August 6, 1951 (T.R. 43-44).

STATEMENT OF THE CASE.

The case, we believe, is one of first impression and is highly important in the administration of the Bankruptcy Act. We believe further, that the decision of this Court will affect the rights of creditors in every bankruptcy case in which contracts of the bankrupt

are not completely performed and thus will involve far more than a mere determination of the rights of these parties to the sum involved. The rule contended for by the appellee is contrary to the accepted practice in all or at least a substantial percentage of the bankruptcy cases in this District.

On July 7, 1950, the Bankrupt, Angelo Pagliaro, purchased the equipment, furniture and fixtures of a restaurant from the appellee C. N. Golden under a Contract of Conditional Sale for \$4,776.00. He made a down-payment and went into possession of the premises of which the appellee was the lessee. His operation of the restaurant was ill-fated and on September 5, 1950, he filed his Voluntary Petition in Bankruptcy and was adjudicated a Bankrupt on that day. The property thereby passed into the custody of the Court for administration for the benefit of his creditors. At the time of the Petition in Bankruptcy, according to the Findings of Fact of the Referee (T.R. 29), the property was worth \$4,750.00. As the balance then due upon the Conditional Sales Contract was \$3,676.00, there was an equity of \$1,074.00 available to the creditors.

On September 25, 1950, twenty days after the date of adjudication, at the First Meeting of Creditors, appellant John Costello was appointed Trustee of the estate.

On October 21, 1950, forty-six days after the date of adjudication, the appellee took this property from the custody of the Court without its permission. He did

not file the customary Petition in Reclamation but instead used unlawful self-help. He operated the restaurant for approximately thirty days and then sold it for \$4,750.00. By this device, he obtained not only the profit on the original sales price, but as an additional profit, the equity available to the claims of creditors of the Bankrupt.

The Referee's Turnover Order required appellee to turn over to appellant \$1,074.00, less \$475.00 paid by appellee as a broker's commission on the resale.

In the subsequent hearing on the Petition for a Turnover Order and on the review by the District Court described above, the appellant contended: That the contract was not an "executory contract" within the meaning of Section 70b of the Bankruptcy Act (11 U.S.C., Sec. 110), requiring the Trustee to assume or reject it within sixty days of the date of adjudication so that his failure to assume did not foreclose any further claims; and that in any event the unlawful acts of self-help prevented the appellee from keeping the additional profit so obtained; and finally that the case was a proper one for equitable relief from forfeiture.

The appellee contended that the contract was an executory contract within Section 70b so that the Trustee's failure to assume it within sixty days terminated any rights he might have had and further that pursuant to provisions of the contract, he was entitled to keep payments made by the Bankrupt as liquidated damages.

Three questions are thus raised for consideration by this Court, which must decide if the appellee is entitled to keep his unlawfully obtained extra profits at the expense of the other creditors: (1) Is a Conditional Sales Contract in which the vendor has fully performed and the vendee has not, an "executory contract" within the meaning of Section 70b of the Bankruptcy Act? (2) Assuming such a contract where one party has performed is an "executory contract" within that Section, can the vendor by taking the property without permission of the Court before the statutory sixty-day period elapses, deprive the trustee of his statutory rights? (3) Do the facts present a proper case for equitable relief under California Civil Code Section 3275 from the forfeiture or loss in the nature of a forfeiture which will result if the appellee is permitted to keep at the expense of the general creditors, sums in excess of one hundred per cent of his sales price as an extra profit?

**SPECIFICATION OF ERROR UPON WHICH
APPELLANT RELIES.**

Appellant specifies as error:

That that certain Order dated July 23, 1951, wherein and whereby the Order of Hon. Bernard J. Abrott, Referee in Bankruptcy, made in the above-entitled matter on March 6, 1951, was reversed, was erroneous and contrary to law in that

(2) the contract between appellee and the Bankrupt, at the date of the Petition in Bankruptcy was not an "executory contract" within the meaning of those words as used in Section 70b of the Bankruptcy Act;

(b) the unlawful taking of property from the custody of the Court by the appellee constituted a conversion of property entitling appellant to damages in the amount awarded by the above-mentioned Order of the Referee;

(c) the case is a proper one for equitable relief from forfeiture under California Civil Code Section 3275 entitling appellant to the amount awarded by the above-mentioned Order of the Referee.

ARGUMENT.

I.

"EXECUTORY CONTRACTS" AS USED IN SECTION 70b MEANS CONTRACTS IN WHICH SOMETHING REMAINS TO BE PERFORMED BY BOTH SIDES, OR AT LEAST CONTRACTS IN WHICH SOMETHING REMAINS TO BE DONE BESIDES THE PAYMENT OF MONEY.

Section 70b provides in part:

"Within sixty days after the adjudication, the trustee shall assume or reject any executory contract, including unexpired leases of real property: PROVIDED, HOWEVER, That the court may for cause shown extend or reduce such period of time. Any such contract or lease not assumed or rejected within such time, whether or not a trustee has been appointed or has qualified, shall be deemed

to be rejected. A trustee shall file, within sixty days after adjudication, a statement under oath showing which, if any, of the contracts of the bankrupt are executory in whole or in part, including unexpired leases of real property, and which, if any, have been rejected by the trustee: PROVIDED, HOWEVER, That the court may for cause shown extend or reduce such period of time * * *"

To interpret the word "executory" as used in Section 70b, we must consider what Congress intended to accomplish by its insertion in the Chandler Act of 1938. Most of the usual aids to interpretation of statutes are of no avail in this instance. The Bankruptcy Act itself contains no definition of the words in question. Nothing has been found in the legislative history of the section which sheds light on the meaning of the words. There was no similar provision in the prior Bankruptcy Acts. The legislative material indicates the section was inserted to codify some former case law which fixed no period of time for acceptance or rejection. *Weinstein, The Bankruptcy Law of 1938, A Comparative Analysis Prepared for the National Association of Credit Men* (1938) 159-160. (Judge Weinstein was the draftsman for Congressman Chandler.) No case has been cited nor can any be found which deals precisely with the question. The only case found which attempts to define the phrase "executory contract" as used in the Bankruptcy Act supports the contention of the appellant. (*In re San Francisco Bay Exposition* (1943), 50 F. Supp. 344; which will be discussed infra.)

Thus we must examine the language of the section and attempt to determine the problem the section was designed to meet.

At the outset we note that the phrase "executory contract" is ambiguous and the Bankruptcy Act contains no definition of it. *Williston on Contracts* (1936 ed.), Section 14 states:

"* * * The same criticism, so far as ambiguity is concerned, applies to the phrase 'executory contracts.' All contracts to a greater or less extent are executory. When they cease to be so, they cease to be contracts."

It is perfectly obvious that Congress was not concerned with fully executed agreements, for the trustee would have no concern with completed deals which were no longer contracts. It was concerned rather with agreements in which something was left to be done either by the bankrupt or the other contracting party, or both, because in such uncompleted agreements there would be assets to recover for the estate, or liabilities to liquidate insofar as possible or perhaps both. If it had been the intention of Congress to cover every agreement in which something remained to be done, that is, everything which could properly be called a contract, it would have been sufficient to state that the trustee must assume or reject "any contract". But Congress added the word "executory" and by the principles of statutory interpretation as recently stated by this Court (*Sampsell v. Straub* (1951), 189 F. (2d) 379), we must give effect to every word of a statute if possible.

There is a reasonable interpretation to give effect to the added adjective "executory" which is supported by case law and by the opinion of one of the leading commentators on bankruptcy law. Executory contracts within the meaning of Section 70b are contracts in which something remains to be performed by *both* parties. The opinion written by Hon. Louis E. Goodman of the United States District Court for the Northern District of California in *In re San Francisco Bay Exposition*, supra, supports this position. Therein the Court states at page 346:

"The referee assumed that any contract not completely performed by either party is executory in the sense which gives rise to the right of disaffirmance. Upon that assumption he held that the Building and Loan Commissioner could disaffirm the subscription agreement, because even though the Exposition had performed, the Commissioner had not; ergo, the contract was executory and the Commissioner could disaffirm. In a literal sense, executory contracts are of course, those wherein performance in whole or in part has not been had. Upon that general premise, without further distinction, the Referee bottomed his decision. *In the sense used in both the California Statute and the Bankruptcy Act, they (i.e., executory contracts) are the type of contracts which call for performance in futuro, such as leases, contracts for electric power, light, heat, delivery of commodities, services and the like.*" (Emphasis ours.)

Where the vendor in a conditional sales contract has delivered the items sold, there is no future per-

formance due by him, and in line with the above decision, such a contract is not an executory contract within the meaning of Section 70b although it might be executory under non-bankruptcy definitions.

A similar view is expressed in 4 Collier on Bankruptcy, page 1228. In a somewhat more extensive discussion the author explains that the language of Section 70b is broader than the intended coverage, and sets forth the problem which the section was designed to meet. After explaining that the section was a codification of prior case law which provided no fixed time for acceptance or rejection, Collier states:

“On the other hand a statutory rule of law should be more exacting as to its wording than a statement of the law of a case. In this respect, Section 70b is not free from ambiguities. It refers to ‘any executory contract.’ As already pointed out in connection with similar language in Section 63a(9), the term ‘executory’ as applied to a contract is equivocal and of little practical value. As long as there remains any part of a contract unperformed, the contract is executory, and subdivision b of Section 70 even emphasizes this broad scope of the term by speaking of contracts of the bankrupt that are executory ‘in whole or in part.’ Now if a vendor sold merchandise to a subsequently bankrupt purchaser and conveyed unconditional title to him, but the bankrupt failed to pay any part of the purchase price, the contract is certainly ‘executory.’ And yet it is obvious that this is not the situation in which the trustee is under Section 70b called upon to assume or reject. The vendor, unless secured, will file his proof

of claim for the entire purchase price, and what the trustee will do is possibly to *object* to the claim but not to *reject* or assume the contract. In the converse case, suppose the bankrupt is not the purchaser but rather the vendor who prior to bankruptcy sold and conveyed title, his solvent debtor and purchaser failing to pay the price. Again, the sales contract is clearly executory 'in part.' Yet what the trustee will do is either to prosecute and enforce or to abandon the bankrupt's claim and right of action transferred to the trustee by operation of law, but there would be no thought of either assuming or rejecting the contract however executory it might be. *Thus Section 70b obviously purports to say more than it intends to say.*" (Emphasis on the last sentence ours.)

We quite agree with the author when he indicates what would be the actual practice in the event of a purchase by the bankrupt where the items were delivered or of a sale by the bankrupt where he had delivered. In those instances there would truly be no thought of assuming or rejecting and such has been the practice. Yet the author notes that these are contracts which are "executory in part". He is perplexed and concludes that the section says more than it intends. This imputes confusion and misunderstanding to the draftsmen of the section.

The proper answer is that "executory" in the bankruptcy sense does not mean the same as "executory" in the non-bankruptcy sense. In the instances in which Collier states there would be no

thought of assumption or rejection, the contracts are those in which complete performance has been rendered on one side. They are executory in the non-bankruptcy sense, but they are not executory in the bankruptcy sense because there is no performance in *in futuro* due from both sides as was suggested as necessary in the *San Francisco Bay Exposition* case, *supra*. Only by this view can the confusion be avoided. Only by this view can the conclusion that the draftsmen did not understand the problem be avoided.

Collier appears to be misled by the following sentence of Section 70b:

“A trustee shall file within sixty days after adjudication, a statement under oath showing which, if any, of the contracts of the bankrupt are executory *in whole or in part*, including unexpired leases of real property, and which, if any, have been rejected by the trustees * * *” (Emphasis ours.)

He seems to conclude that a contract executory “in whole” is one where neither party has performed, and a contract executory “in part” is one where one party has performed and the other party has yet to perform. If this were the only possible interpretation, the conclusion of confused draftsmanship would be correct. We think, however, that the better view is that within the meaning of Section 70b, a contract executory in part is one in which part of the performance by one or by both parties has been performed but there remains a part of the performance to be rendered by both parties. A simple example is

a contract for the purchase of two items. The contract is executory in part if only one of the items has been delivered or if a down-payment has been made, without full delivery, or if one of the items has been delivered and paid. In such cases, there is performance due from both parties.

The explanation by Collier of the legislative purpose in adding Section 70b contains a strong indication that Congress was thinking in terms of mutuality of performance. He states in Volume 4 at page 1229:

“The legislative intent back of Section 70b and the purpose of the provision is to solve the problem of *assumption of liabilities*.” (Emphasis of the author.) “It is conceivable that a system of bankruptcy might compel the non-bankrupt party to a contract, the performance of which is *incomplete as to both contracting parties*, to continue performing while for the counterpart to refer him to a mere dividend out of the estate. Needless to say, such a solution is neither wise from the viewpoint of commercial credit, nor fair from the viewpoint of equity. It neglects one of the basic principles of equity, *mutuality of obligation and performance*. What Section 70b actually proposes to do is precisely to secure this continued mutuality wherever it is felt to be of greater benefit to the estate to proceed in accordance with the debtor’s plans rather than to freeze his commercial relations as of the filing date.” (Emphasis ours.)

Our view that executory contracts in Section 70b means contracts in which performance remains due on

both sides is the one that meets the Congressional concern for mutuality of obligation and performance.

A vendor of a conditional sales contract who has delivered has performed completely at the date of bankruptcy. He does not need to execute a conveyance or a bill of sale. Payment or tender by a purchaser vests title in the purchaser whether the payment is voluntary or through legal proceedings. *Arnois v. Bell* (1924), 70 Cal. App. 222, 232 Pac. 758; *Casady v. Fry* (1931), 115 Cal. App. Supp. 777, 6 Pac. (2d) 1019. Therefore, such contracts are not executory for the purposes of Section 70b.

We believe that Congress intended the words "executory contracts" to cover contracts in which performance remained due from both parties. However, even if Congress did intend to include *some* contracts in which performance remained due from one party only, we submit that they did not mean contracts in which the only thing left to be done was the payment of money. Surely a trustee need not assume or reject an obligation to pay a debt. Regardless of whether he assumes or rejects, the creditor can file a claim to collect his debt. As Collier explains in the section hereinabove quoted, what the trustee will do is to *object* to the claim if he has any valid ground for objection. He cannot deprive the creditor of his day in Court by his rejection out of Court. Must he reject out of Court and then object in Court? We think not. On the other hand, the trustee must pay all claims with which he has no dispute. Must he then promise

to do something he is legally obligated to do? We think not. If the trustee is required to assume or reject an obligation to pay money, he is required to do an idle and superfluous act.

In re San Francisco Bay Exposition, supra, supports the view that a contract is not executory if the only thing remaining to be done is the payment of money. The case involved a subscription agreement. All the parties had subscribed except the Building and Loan Commissioner. The contract was performed except for the obligation for payment of money by the Commissioner who contended that under those facts the contract was executory. Judge Goodman held, however, that the contract was not executory within the meaning of the California statute and the Bankruptcy Act.

Cases on the law of corporations show that contracts are no longer executory if nothing remains to be done but the payment of money. The usual situation shows the corporation attempting to avoid payment of money under a contract after receiving the benefits of the performance by the other party by claiming that the contract was *ultra vires*. The courts answer that if the contract were executory, they would not enforce it, but if the corporation has received the benefits of performance, it cannot refuse to pay for it with the defense of *ultra vires*. In *Bradley v. Ballard* (1870), 55 Ill. 413, the Court states:

“While a contract remains executory, the powers of corporations cannot be extended beyond their

charter limits for the purpose of enforcing it. Not only so but on the application of a stockholder, or of any person authorized to make the application of a stockholder, or of any person authorized to make the application, a court of chancery would interfere and forbid the execution of a contract *ultra vires*. * * * But if one of the contracting parties proceeds in the performance of the contract, expending his money and his labor in the production of value, which the corporation appropriates, we can never hold the corporation excused from payment on the plea that the contract was beyond its power."

The *Bradley* case was quoted with approval in *Main v. Casserly* (1885), 67 Cal. 127.

II.

IF A CONDITIONAL SALES CONTRACT IS AN EXECUTORY CONTRACT WITHIN SECTION 70b, THE TRUSTEE IS ENTITLED TO 60 DAYS TO ASSUME OR REJECT. A VENDOR CANNOT BE PERMITTED TO SHORTEN THE TIME BY UNLAWFUL REPOSSESSION.

Even if we are in error in our view that an executory contract within Section 70b is one where performance remains due on both sides, the Order of the Court below should be reversed. If such a contract is executory, the trustee is given sixty days from the date of the adjudication to assume or reject. The trustee should have possession of the property in order to have it appraised and make it available for the examination of prospective purchasers. If the vendor is permitted unlawfully to repossess before the trustee

has had the sixty-day opportunity given by statute to make a careful choice whether to assume or reject, then the law is not that the trustee has sixty days to assume or reject but that the trustee only has until the vendor unlawfully seizes the property to make his choice. It is certainly no answer that even though the vendor has seized the property, the trustee until the expiration of the sixty-day period can always notify the vendor that he assumes the contract and force him to return it because this would force a blind choice on the trustee.

Repossession by the vendor without leave of Court is a conversion. Section 70a of the Bankruptcy Act vests in the trustee the title of property owned by the bankrupt. The bankrupt as purchaser under a conditional sales contract was the beneficial owner of the property sold. *Bowden v. Bank of America* (1951), 36 Cal. (2d) 406, 224 Pac. (2d) 713. Therefore, the trustee as beneficial owner of this property, being charged by Section 47a(1), 11 U.S.C. Section 75, with the duty of collecting the property and reducing it to money can maintain an action for conversion of the property and in so doing can obtain the proceeds of the property converted. This is precisely what the trustee has done in this case. The Trustee need not bring a plenary suit for conversion. The property of the bankrupt having been in the bankrupt's possession at the date of bankruptcy, it thereby passed into possession of the bankruptcy court giving it summary jurisdiction. The petition for a turnover order invoking summary jurisdiction is the equivalent of a conversion suit in a plenary action. The

trustee was merely using the expeditious procedure available to him under the Bankruptcy Act.

If a conditional sales contract is an executory contract and the conditional vendor had repossessed more than sixty days after bankruptcy, it would be an entirely different situation. In that case the trustee's failure to assume the contract within sixty days would be an abandonment of his interest and he would no longer have any property interest to be converted. He could no longer institute a turnover proceeding. But such is not the case here. In this case the trustee had a property interest for sixty days, and it is that property interest which was converted by seizure *before* the elapsing of that time. It is for the wrongful taking of that interest that the Referee ordered the appellee to pay over the value of such interest.

III.

APPELLANT IS ENTITLED TO EQUITABLE RELIEF FROM FORFEITURE UNDER CALIFORNIA CIVIL CODE SECTION 3275.

Section 3275 provides:

“Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty.”

Federal Courts will apply this section in a proper case and indeed this Court has recently applied it.

Title Insurance and Guaranty Co. v. Hart (U.S.C.A. 9th, 1947), 160 Fed. (2d) 961.

There is a forfeiture or a loss in the nature of a forfeiture in this case. The bankrupt had an equity of \$1,074.00 in the property. If the appellee is permitted to keep that equity for himself in addition to 100% of the sales price, the estate will suffer a loss in the nature of a forfeiture. The forfeiture is incurred by reason of failure to comply with the provisions of the contract calling for payments.

The section also requires full compensation to the other party as a condition for relief of the party invoking the section. Where the other party by his own wrongful acts deprives the invoking party of the means with which to make compensation but in the process obtains full compensation, a court of equity will find the requirement of compensation met. Unless this is true, then a court of equity will permit a party to profit by his own wrong.

Section 3275 has been held applicable to contracts of conditional sale of personalty. In *Miller v. Modern Motor Co.* (1930), 107 Cal. App. 38, 290 Pac. 122, the conditional vendor of an automobile repossessed for non-payment. The Court held Section 3275 applicable and permitted the buyer to have the automobile upon payment of the entire balance due on the purchase price.

The contract in the instant case is likewise one for the conditional sale of personal property, and the facts justify the application of Section 3275. It would be difficult to find a more compelling case for the in-

tervention of equity. Many creditors will receive only a small percentage of their claims as dividends from the estate. One creditor in violation of legal procedures has seized and sold an asset of the estate, obtaining for himself funds far in excess of 100% of his claim. A court of equity is asked to require him to remit the amount in excess of 100% under a code section authorizing such relief.

CONCLUSION.

In conclusion it is respectfully submitted that the Order of the District Judge reversing the Order of the Referee should be reversed because (1) contracts in which performance by one party is completed are not executory contracts within the meaning of Section 70b; (2) or even if they are, the wrongful act of retaking without permission before the statutory period of sixty days had elapsed was a conversion entitling trustee to pursue the summary remedy provided therefor in the Bankruptcy Act which he did so pursue; (3) and finally, the case is a proper one for relief for forfeiture under California Civil Code Section 3275.

Dated, San Francisco, California,
November 30, 1951.

Respectfully submitted,

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Of Counsel.

No. 13,082

IN THE

United States Court of Appeals
For the Ninth Circuit

JOHN COSTELLO, Trustee of the Estate
of Angelo Pagliaro, Bankrupt,

Appellant,

vs.

C. N. GOLDEN,

Appellee.

BRIEF FOR APPELLEE.

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Appellant,

VS.

C. N. GOLDEN,

Appellee.

BRIEF FOR APPELLEE.

The facts: Appellant seems to have presented the facts accurately.

THE LAW.

Now let us look at the specifications of error upon which Appellant relies:

1. Is the contract between Appellee and the Bankrupt, at the date of the petition in Bankruptcy an "Executory Contract" within the meaning of those words as used by Section 70-b of the Bankruptcy Act?

Appellee cites only one case, i.e., *In re San Francisco Bay Exposition* (1943), 50 F. Supp. 344, to

back his contention the executory contract of Appellee does not come within the purview of Section 70-b of the Bankruptcy Act, which section is quoted in full in Appellant's Brief. The discussion of Hon. Louis E. Goodman in that case centers on a California Statute and not the Bankruptcy Act; his reference to the Bankruptcy Act is a mere comparison by him of two acts and at the most represents an opinion or dictum by him on a point for which he cites no authority and which opinion does not set a precedent as the Bankruptcy Act was not at issue in the case.

The only other authority cited by Appellant was a quotation from 4 Collier on Bankruptcy, page 1228. Once again Appellant is citing the opinion of a man who cites no authority to back his opinion, which opinion is that of a text-book writer.

An examination of 70-b of the Bankruptcy Act shows that it is a mere restatement of the law as it existed before this section was codified. Long before this section was codified the duty of a trustee to adopt or reject a conditional sales contract was recognized by the following authorities:

Bailey v. Baker Ice Mach. Co., 36 S. Ct. 50;

In re Wegman Piano Company, 221 F. 128;

Matter of Ferrell, 246 F. 743;

In re Burgermeister Brewing Co., 84 F. (2d) 388;

In re White Plains Ice Service Inc., 109 F. (2d) 913;

In re Halfety, 136 F. (2d) 640;

Blakely v. Hutchings, 203 N.W. 86;

6 *Am. Jur.* p. 1133.

Appellant rests his entire argument on the proposition a conditional sales contract is not an executory contract within the meaning of Section 70-b of the Bankruptcy Act in that only one party to the contract is obligated to perform, i.e., the Buyer or Bankrupt. Actually the contract in question was more than a conditional sales contract between the parties. It represented that type of executory contract which Appellant claims is the only type covered by said Section 70-b of the Bankruptcy Act. Page 53 of the Transcript of Record sets forth a copy of the alleged conditional Sales Contract, and a close study of this contract reveals duties and obligations resting upon both parties to it.

According to the said contract the buyer was to pay all rent and utility services furnished to said premises, in addition to the payment of the purchase price.

There were many obligations on the part of the Appellee or Seller under this contract. 1. Seller was to arrange a transfer of the lease to Buyer upon completion of the purchase. 2. Seller by implication from the contract was to maintain the lease while Buyer operated the business sold to him and to pay the rent from money received from Buyer; this implication is supported by the testimony of Mr. Golden commencing on line 11 of page 63 of the Transcript of Record continuing over to bottom of page 65. On page 64 is the question by the referee: "Did Mr. Pagliaro, when he would make the payments, did he give you a hundred himself and then would he also give you eighty dollars rent and then you in turn paid

the owner of the property? A. That's right." 3. That Seller maintain all utilities.

There can be no doubt but that the very purpose of Section 70-b of the Bankruptcy Act is to protect such persons as the Appellee:

During the time the trustee did not accept the executory contract and agreement, the entire business remained closed, bills ran up, and customers were lost to other businesses. If the trustee could wait indefinitely to affirm or disaffirm the contract entered into by Mr. Pagliaro, Appellee would have risked and suffered the benefits of a business built up by him and sold to the bankrupt for a small down payment. This then is the equitable reason for Section 70-b of the Bankruptcy Act as it is applied to Appellee.

ARGUMENT II.

A vendor cannot be permitted to shorten the sixty day period by unlawful repossession if Section 70-b applies to this case.

There is the possibility that the acts of Appellee amounted to a technical conversion of the property but at the date the turn-over order was issued by the referee in Bankruptcy, the trustee had not elected to affirm the contract in accordance with 70-b of the Bankruptcy Act. The turn-over order was a very clever method to try to reap the benefits of a contract without shouldering any of its responsibilities as set forth under Argument II above and to avoid the requirements of Section 70-b.

The trustee is not using the turn-over order of the Court to obtain restitution of property, he is trying to obtain money for what he calls a conversion. Such an action for money must be by way of a plenary suit.

If the trustee had obtained repossession of the property by way of proper turn-over order the referee later would have had to reclaim the assets to Appellee on grounds the said Appellant had not fulfilled the obligations of the Executory Contract nor assumed the said contract with its obligations.

ARGUMENT III.

Appellant is entitled to equitable relief for forfeiture under California Law.

The equity of the Bankrupt in the property represented approximately 25% of the total purchase price of the business, and the conditional sales contract expressly allowed the seller to retain all payments made as liquidated damages upon a breach by the buyer. This amount of damages in view of the breach of the purchaser does not in the eyes of Appellee appear to be so unreasonable an amount as to require equitable relief.

In addition more than three months elapsed since the breach by the bankrupt and the election of the seller to sell to another party, which length of time under California Law gives the seller the right to repossess and retain all price instalments paid. (*Goldberg v. List*, 11 C. (2d) 389 at 393; *Liver v. Mills*, 155 Cal. 459.)

That Appellant would be unable to maintain a suit against Appellee for possession or conversion under California Law if no Bankruptcy proceedings had been commenced is clearly shown by the above cases.

Appellant cites one California case to show application of C.C. 3275. The case cited deals with a waiver of a "time is the essence" clause and represents a breach by the buyer for a short time. The leading California case is contrary to Appellant's view. *Glock v. Howard Wilson Colony Co.*, 123 Cal. and *Land-folh v. Cohen*, 89 C.A. (2d) 177, 180.

In conclusion it appears clear to Appellee that Section 70-b of the Bankruptcy Act precludes Appellant recovery in that Appellant has waited more than sixty days in which to act, that Appellant has chosen the wrong remedy to enforce his demand, and no case is set out for application of equity to preclude a forfeiture under California Law.

Dated, Richmond, California,
February 25, 1952.

Respectfully submitted,

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No. 13,082

IN THE
United States Court of Appeals
For the Ninth Circuit

JOHN COSTELLO, Trustee of the Estate
of Angelo Pagliaro, Bankrupt,

Appellant,

vs.

C. N. GOLDEN,

Appellee.

APPELLANT'S REPLY BRIEF.

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No. 13,082

IN THE
United States Court of Appeals
For the Ninth Circuit

JOHN COSTELLO, Trustee of the Estate
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Appellant,

vs.

C. N. GOLDEN,

Appellee.

APPELLANT'S REPLY BRIEF.

Appellee's Brief is an attempt to justify what he now admits to be an unlawful seizure of assets by appealing to the conscience of a court of equity. We respectfully direct the attention of the court to two important factors neglected by the Appellee. The first is the subject matter of the litigation. The Appellant Trustee claims the sum of \$600.00 held by the Appellee which is the excess over one hundred percent of the money Appellee was to receive from the bankrupt, plus the commission Appellee paid on resale. He asks a court of equity to permit him to keep more than 100% of his claim against the bankrupt, and send away empty-handed other creditors of the bankrupt

who will receive far less than 100% of their claims even if they prevail here. In subsequent discussion we will point out that his arguments and authorities are based upon the premise that Appellant is trying to deprive him of part of his contract price rather than a sum in excess of his full price. The second neglected factor is that the Appellee admits he does not come into court with clean hands. He concedes that there is the possibility that his unlawful act, namely, taking property from the trustee without permission of the court was a conversion but attempts to escape the inevitable result by giving his act the meaningless label "technical" conversion. We will show that lawful means were available for Appellee's protection but he did not use them. Courts of equity do not give relief in such a situation.

I.

THE REFEREE HAD JURISDICTION TO MAKE A SUMMARY ORDER; THE REFEREE'S ORDER ALLOWED APPELLEE ALL HE WAS ENTITLED TO; APPELLEE'S WRONGFUL ACT CANNOT DEPRIVE APPELLANT OF HIS STATUTORY RIGHT.

We contended in our Opening Brief that even if the contract in the instant case were "executory" within the meaning of Section 70b of the Bankruptcy Act (11 USCA Sec. 110b), the trustee had sixty (60) days to assume or reject and the Appellee could not shorten that period by unlawful seizure within that period. Appellee first admits that his seizure might be a conversion but contends that the only remedy for

it was by a *plenary* suit. This is error because it is basic bankruptcy law that the bankruptcy court has *summary* jurisdiction over property in the possession of the bankrupt at the date of bankruptcy. *Taubel-Scott-Kitzmiller Co. Inc. v. Fox* (1924), 264 U.S. 426, 44 S. Ct., 396, 68 L. Ed. 770; *Taylor v. Sternberg* (1935), 293 U.S. 470, 55 S. Ct. 260, 79 L. Ed. 599; *Shortridge v. Utah Savings & Trust Co.* (U.S. C.A. 10th 1930), 40 F. (2d) 328.

He says further that if the trustee had retrieved the property by a proper turn-over order, the Referee would be forced to give it right back to the Appellee because the trustee had not assumed the contract within sixty days. Congress, however, has given the trustee sixty days to make a careful determination. It seems to be Appellee's view that he can force a blind choice on the trustee by unlawful seizure within the sixty (60) days and detention of the property until after the sixty (60) days have passed. Under Appellee's view, when the trustee demands return of the property to enable him to make a proper determination of its value and marketability, the vendor may refuse on the basis that the trustee has not made his choice within sixty (60) days even though it was the vendor's own wrongful act which prohibited the trustee from being able to make a proper election. Clearly such an absurd proposition is not the law. As the Appellee has wrongfully seized the property, the trustee is entitled to have it returned by a summary order. As Appellee has disposed of it and cannot return the property, the trustee may demand the

proceeds or at least, as in this case, that part of the proceeds representing the bankrupt's equity in the property seized. This was the view of the Referee who made such an order.

Appellee's statement that the turn-over order was a clever method to get the benefits of a contract without taking the responsibilities ignores the fact that if the trustee had adopted the contract as an executory contract, Appellee would have received no more than he is permitted to receive by the Referee's order. The order of the District Judge reversing the Referee results in a windfall to Appellee at the expense of other creditors.

II.

THE REFEREE'S ORDER ALLOWED APPELLEE THE FULL COMPENSATION REQUIRED BY SECTION 3275; APPELLEE'S CASES ARE NOT IN POINT ON THE RELIEF SOUGHT IN THIS CASE.

California Civil Code Section 3275 provides as follows:

“Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty.”

The facts disclose no such aggravated breach here and none has been charged. *Miller v. Modern Motor Co.*

(1930), 107 Cal. App. 38, 290 Pac. 122 holds that Section 3275 is applicable to contracts for the conditional sale of personalty. The instant case is concerned with such a sale.

In the instant case there was a breach by the bankrupt which would cause "a loss in the nature of a forfeiture". If full compensation can be made, the court will relieve from forfeiture. The breach was a failure to pay the contract price and if Appellee can be made whole, Appellant should be relieved from the forfeiture of his equity. Upon payment to Appellee he would be entitled to have the property or its proceeds. But Appellee by his wrongful act deprived Appellant of the means of making compensation. The Referee, acting as a court of equity, circumvented a useless exchange of dollars for dollars and allowed Appellee full compensation out of the proceeds and to relieve the forfeiture ordered him to turn over to Appellant the value of Appellant's equity. This is a clear case for the application of the statutory relief.

Appellee's arguments against the application of this statute are based upon the above mentioned failure to realize that Appellant is not seeking to deprive him of his contract price but only of the excess over that. He states that the equity of the bankrupt was small and he should be allowed to keep the payments theretofore made by him as liquidated damages for the breach. Indeed he should be permitted to keep those payments and Appellant is not asking him to return them. In addition to those payments, he is en-

titled to enough to make up his full contract price plus the commission he paid on resale. All this was allowed him by the Referee's order. Appellant only seeks the excess over this amount.

Many cases have been decided under Section 3275 and in his defense to its application, he cites as a leading California case *Glock v. Howard & Wilson Colony Co.* (1898), 123 Cal. 1, 55 Pac. 713. As Section 3275 was never discussed in the *Glock* case, it is not authority on that section. It is also quite significant to note that the issue in the *Glock* case was whether the buyer could get back the payments he had made and not whether he could get the excess over full payment. An important reason why he could not succeed was that there was a provision that time was of the essence of the contract and a delay of three years from the breach to the action. There is no provision in the contract in this case that time is of the essence and the delay is short. The liberal application of this code section by the courts has not been thwarted by a provision that time is of the essence. *Barkis v. Scott* (1949), 34 C. (2d) 116, 208 P. (2d) 367 (now the leading case on the section).

Appellee further cites *Goldberg v. List* (1938), 11 C. (2d) 389, 79 P. (2d) 1087; and *Liver v. Mills* (1909), 155 Cal. 459, 101 Pac. 299 for the proposition that a three month interval between breach by the buyer and election to resell by the seller gives the seller the right to repossess and retain price installments paid. Once again cases are cited on the right to retain payments rather than to have the excess over full

payment. Neither case mentions Section 3275 nor does either case support the proposition for which it is cited. Neither case even mentions the right to retain payments. *Goldberg v. List* does not even show the time interval between breach and retaking of the property by the seller. We call to the court's attention a statement in *Liver v. Mills* to the effect that where the vendor repossesses, the defaulting vendee may still complete the purchase and perfect his right to receive the property by paying the balance due. 155 Cal. at 462, 101 Pac. at 300. This supports Appellant's case rather than Appellee's.

The two cases are also cited for the proposition that Appellant could not maintain an action against Appellee for possession or conversion if there were no bankruptcy. The trustee of a bankrupt vendee has the right of possession of property in the hands of the bankrupt at the date of the petition. Bankruptcy Act Section 70a (11 U.S.C.A. Section 110a). That possession can only be disturbed by permission of court such as a Petition in Reclamation. *Matter of Dialogue* (1914), 215 Fed. 462, 32 Am. B. R. 183. Appellee's point amounts to nothing more than that if there were no bankruptcy, his act of taking the property would be lawful. This cannot help him because the facts are that there was a bankruptcy and his act was not lawful. Thus Appellant has shown a proper case for the granting of relief under Section 3275 and that Appellee's objections are without merit.

III.

APPELLEE HAD NO REAL DUTIES UNDER THIS CONTRACT; APPELLEE'S FAILURE TO USE PROPER PROCEDURES FOR HIS PROTECTION DOES NOT JUSTIFY MAKING AN ERRONEOUS DEFINITION OF "EXECUTORY CONTRACT".

Appellee's attempt to escape from the definition of an "executory contract" as set forth by Appellant in his Opening Brief consists solely of his unwillingness to accept the views of the court in *In Re San Francisco Bay Exposition* (1943), 50 F. Supp. 344 and of the authors of Collier on Bankruptcy.

He cites seven cases and a digest for the point that prior to the enactment of Section 70b, it was the duty of the trustee to adopt or reject a conditional sales contract. (Appellee's Brief, p. 4.) None of those cases support that proposition. They say absolutely nothing about any duty of a trustee to affirm or reject. They merely point out that the vendee's interest in a conditional sales contract, the right to acquire title upon payment, is property which passes to his trustee who may exercise it if he chooses.

Appellee attempts to bring his contract within the definition of an executory contract as set forth by Appellant. Yet upon examination of the supposed obligations of the seller it appears that there was nothing of substance to be done by him. The so-called obligation to arrange a transfer of the lease was merely a case of formalizing an act that had already been accomplished because the Appellee had put the bankrupt in possession and the bankrupt had paid the rent which went to the owner of the property. As

for the suggested implied duty to “maintain” the lease and to “maintain” the utilities, the contract provided that the *buyer* was to pay all rent and utilities (T.R. p. 56) so the seller had no real duties.

Finally, the Appellee claims that “the equitable reason” for applying Section 70b is that he would risk the loss of the value of his property if the trustee could wait indefinitely “to affirm or disaffirm the contract”. Nothing could be farther from the truth. The Appellee could have promptly filed a Petition in Reclamation (and this regardless of whether the contract was executory or not). He did not have to exercise self-help. He now asks the court to approve his wrongful act by distorting the definition of an executory contract.

In conclusion it is submitted that the Appellee should be compelled to return to Appellant the amount he received in excess of the purchase price of the restaurant and the cost of reselling it. To this end the order of the District Court reversing the Referee should be reversed.

Dated, San Francisco, California,

March 5, 1952.

Respectfully submitted,

SHAPRO & ROTHSCHILD,

Attorneys for Appellant.

DANIEL R. COWANS,

Of Counsel.

No. 13085

United States
Court of Appeals
for the Ninth Circuit.

HOWARD M. COURTNEY,

Appellant,

vs.

CUSTER COUNTY BANK, a Corporation, and
OLIVER T. DAVIS,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Idaho
Eastern Division

FILED

NOV - 7 1951

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HOWARD M. COURTNEY,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

HENRY McQUADE, ESQ.,
Pocatello, Idaho,

R. DON BISTLINE, ESQ.,
Pocatello, Idaho;

For the Plaintiff.

O. R. BAUM, ESQ.,
Pocatello, Idaho;

RUBY Y. BROWN,
Pocatello, Idaho,

For the Defendants.

In the District Court of the United States of
America, in and for the District of Idaho,
Eastern Division

1598

HOWARD M. COURTNEY,

Plaintiff,

vs.

CUSTER COUNTY BANK, an Idaho Banking
Corporation, and OLIVER T. DAVIS,

Defendants.

COMPLAINT

Comes now the plaintiff and for cause of action
against the defendants complains and alleges:

I.

That plaintiff is now and at all times hereinafter
mentioned has been a resident of the State of
California.

II.

That the defendant Custer County Bank is an
Idaho banking corporation, duly organized and
existing under and by virtue of the laws of the
State of Idaho and qualified to do business in the
State of Idaho, with its principal place of business
at Challis, Custer County, Idaho; that defendant
Oliver T. Davis is now and at all times hereinafter
mentioned was an officer of said corporation, acting
in his employment as an agent and employee of
said corporation, to wit, Cashier.

III.

That at the time and place hereinafter set forth, the Fourth of July Mining Company was an Idaho mining corporation organized and existing under and by virtue of the laws of State of Idaho, with its principal place of business at Sunbeam, Idaho.

IV.

That on or about the 22nd day of November, 1946, the said Fourth of July Mining Company made, executed and delivered to said defendant banking corporation its certain chattel mortgage on personal property, in the sum of Seven Thousand Five Hundred Dollars (\$7,500.00), which said mortgage is on record as Instrument No. 9490, 97777 of the records of Custer County, Idaho, filed for record November 25, 1946, in Book 8, Minutes of Mortgages on Personal Property, at page 166, covering the following described personal property, to wit:

One 40 to 50-ton Mill, complete, including:

- 1 Large ore crusher;
- 1 Fine ore crusher;
- 1 Ball Mill, complete;
- 1 40 HP engine;
- 1 3-cell flotation machine;
- 1 Single-cell flotation machine;
- 1 New generator and 12 motors, ranging from 30 HP down to 1½ HP;
- Blacksmith shop, complete;
- 1 Pelton wheel, complete, and all miscellaneous tools and fittings;

- All assay equipment;
- 1 Chicago pneumatic compressor, Serial 61879 (8033096);
- 10 Tons of rail;
- 5500 feet of pipe and fittings;
- 1 150 HP Diesel Motor, complete with direct-driven generator.

V.

That thereafter, but some time prior to September 23, 1947, that said defendant banking corporation, by and through its agent, Oliver T. Davis, learned, or was advised, or discovered, that certain property in the above-described mortgage on personal property did not belong to the mortgagors, that is, said Fourth of July Mining Corporation, said property being, to wit, a portion or all of the following described property:

One 40 to 50-ton Mill, complete, including:

- 1 Large ore crusher;
- 1 Fine ore crusher;
- 1 Ball-Mill, complete;
- 1 40 HP engine;
- 1 3-cell flotation machine;
- 1 Single-cell flotation machine;
- 1 Blacksmith shop, complete, less anvil;
- 10 Motors, ranging from 30 HP to 1½ HP;
- 1 150 HP Diesel Motor, complete with direct-driven generator;

that said banking corporation thereupon, by and

through its agent, Oliver T. Davis, demanded of said mining corporation and its officers immediate payment of said above-described mortgage, and did further advise said mining corporation and its officers that, if payment was not made at once, criminal prosecution would be instituted under the laws of the State of Idaho against said corporation and its officers, for mortgaging property to which it did not have title, or which it did not own.

VI.

That after such threat of criminal prosecution by the said defendant banking corporation, by and through its agent, Oliver T. Davis, said mining corporation and its officers entered into negotiations with plaintiff for the loan of the sum of Ten Thousand Dollars (\$10,000.00); that plaintiff, without any knowledge of the facts set forth in paragraph V hereof, offered and agreed to loan said sum to said mining corporation, provided said mining corporation would give as security to plaintiff for such loan a mortgage upon all the property that said mining corporation had at said time mortgaged to the defendant bank, together with certain additional property that said mining corporation had mortgaged to one Roy E. Bassett, said property mortgaged to Bassett being as follows, to wit:

- One 1941 GMC Truck, Motor No. 27,025,819,
Serial No. 159729A2;
- One 200 Am. Lincoln portable welder.

VII.

That, for the purpose of consummating said transaction, plaintiff came to Challis, Idaho, and with the officers of said mining corporation, and on the 23rd day of September, 1947, went to the defendant bank and its agent, Oliver T. Davis, Cashier; that said bank and its agent, Oliver T. Davis, were engaged by plaintiff and said mining corporation to prepare the papers and handle the escrow and serve as escrow holder in connection with the preparation of the said mortgage for Ten Thousand Dollars (\$10,000.00), and the disbursement of the sum of \$10,000.00 being loaned by plaintiff to said mining corporation.

That at said time and place the defendant corporation, by and through its agent, defendant Oliver T. Davis, well knew and was informed that the loan was being made by plaintiff to said mining corporation for the purpose of said mining corporation paying off the above-described mortgage obligation of said mining corporation to the bank; that said banking corporation, by and through its agent, Oliver T. Davis, further knew that the reason said mining corporation was paying such obligation to defendant bank was that it, the said banking corporation, by and through its agent, Oliver T. Davis, had demanded payment from such mining corporation at once or criminal prosecution would be instituted against the mining corporation and its officers for mortgaging property not belonging to such mining corporation.

That further, and by reason of the fact that said

defendant bank, by and through its agent, Oliver T. Davis, was employed and assumed the responsibility of preparing said mortgage, promissory note, assignment of lease agreement, mortgage release and escrow agreement, and was further employed to act as escrow holder, the said defendant bank and its agent, Oliver T. Davis, became fiduciary agents of plaintiff, and thereby were bound and required to advise, disclose, reveal and divulge to said plaintiff their interest in said proposed loan of \$10,000.00 from plaintiff to said mining corporation, and all information concerning the mortgage of said mining corporation to the defendant bank, and knowledge of the unlawful mortgaging by said mining corporation of property it did not own; that the said defendant bank did not make such disclosures, but accepted such employment as herein set forth.

VIII

That the defendant banking corporation, by and through its agent, Oliver T. Davis, was on the 23rd day of September, 1947, given the following instructions by plaintiff for the preparation of said mortgage and escrow agreement, to wit:

(a) Prepare a mortgage covering all property described in the mortgage hereinabove described as held by said defendant bank, and covering in addition thereto the property described in the mortgage held by said Roy A. Bassett, as hereinbefore described.

(b) Upon the execution of such mortgage on personal property and a promissory note

secured by such mortgage, and the performance of other conditions hereinafter set forth, to pay over the sum of Ten Thousand Dollars (\$10,000.00), delivered by plaintiff to said defendant bank, to the said mining corporation.

(c) To prepare an escrow agreement, by the terms of which said bank was to act as escrow holder and hold an assignment of lease agreement made by said mining corporation to plaintiff, and the aforesaid promissory note, and to disburse the said \$10,000.00.

(d) To record the mortgage and to prepare and obtain a release of the mortgage held by said defendant bank on the property of the said mining corporation.

IX.

That thereafter the said defendant bank, by and through its agent, Oliver T. Davis, in violation of the aforesaid instructions of the plaintiff and, further, without disclosing to plaintiff its knowledge or that of its agent, Oliver T. Davis, with respect to the mortgage held by it, wherein said mining corporation mortgaged property not belonging to it and, further, without disclosing the threat of criminal prosecution made by it through its agent, Oliver T. Davis, to said mining corporation and its officer, and acting as the fiduciary agent of plaintiff in the preparation of the mortgage and escrow agreement, did prepare such mortgage and did knowingly, fraudulently, and designedly, and with the intent to defraud and deceive plaintiff,

prepare such mortgage contrary to the instructions of plaintiff, in the following particulars, to wit:

1. Prepared a mortgage covering the following described property, to wit:

- 1 Compressor, Chicago, 315 cu. ft., with 6-cylinder gas motor; 500 feet of air hose, 1¼ inch;
- 2 Stopers, Ingersoll-Rand, complete w/fittings;
- 1 Jack hammer, Ingersoll-Rand;
- 6 Sets steel for stopers;
- 1 Box diamond points;
- 15 Ton of rail;
- 4 Ore cars;
- 5,500 feet pipe and fittings;
- 1 Carriage car;
- 1 Air receiver tank, large;
- 2 Water receiver tanks;
- 2 Knockdown 54-bbl. tanks;
- 2 30-HP motors;
- 2 Wagon drills, Ingersoll- Rand;
- 1 Generator, 123 HP, powered by Pelton wheel, complete;
- 1 Large anvil;
- 20 Rolls tar paper;
- 1 Set pipe cutters and dies;
- 1 Paint spray outfit w/Curtis compressor; Wisconsin motor, mounted on Menterden trailer;
- 1 Mill located on Buckeye mill site, adjacent to Yankee Fork in Custer County, Idaho;

Assay Equipment:

- 1 Rock crusher;
- 1 Braun pulverizer
- 1 Furnace burner;
- 2 Small butane burners;
- 1 Butane regulator;

which property in said mortgage as prepared by the defendant bank, through its agent, Oliver T. Davis, was the property described on a list furnished said Oliver T. Davis by said mining corporation by and through its agents, which list plaintiff had never been furnished and which the defendant bank, through its agent, Oliver T. Davis, knew had not been furnished to, nor exhibited to, plaintiff.

2. Prepared a mortgage contrary to the instructions of plaintiff, in that the following described property was omitted, to wit:

One 1941 GMC Truck, Motor No. 27,025,819,
Serial No. 159729A2;

One 200 Amp. Lincoln portable welder.

which was the property described in that certain mortgage from the mining corporation to Roy A. Bassett, and was omitted, although defendant bank, by and through its agent, Oliver T. Davis, had been instructed by plaintiff to include such equipment in the mortgage being made and given as security for the loan of \$10,000.00 by plaintiff to said mining corporation.

3. Prepared a mortgage contrary to the instruc-

tions of plaintiff, in that the following described property was omitted, to wit:

One 40 to 50-ton Mill, complete, including:

- 1 Large ore crusher;
- 1 Fine ore crusher;
- 1 Ball-Mill, complete;
- 1 40-HP engine;
- 1 3-cell flotation machine;
- 1 Single-cell flotation machine;
- Blacksmith shop, complete;
- 1 150-HP Diesel motor, complete w/direct-driven generator;

which said property was described in that certain mortgage from the mining corporation to the defendant bank, and was omitted although the defendant bank, by and through its agent, Oliver T. Davis, had been instructed by plaintiff to include all equipment in said mortgage from the mining company to said bank, in the mortgage being made from the mining company to plaintiff, as security for the loan of \$10,000.00 by plaintiff to said mining corporation.

X.

That, further, the said defendant bank, by and through its agent, Oliver T. Davis, well knowing that certain property described and mortgaged in the mortgage held by it from the said mining company did not belong to said mining company, and further well knowing that said bank, by and through its agent, Oliver T. Davis, had threatened

said mining corporation and its officers with criminal prosecution for mortgaging property not belonging to said mining corporation, if said mortgage was not paid, did knowingly, fraudulently and designedly, and with the intent to deceive, defraud and mislead plaintiff, and for its own gain and benefit, and although serving in a fiduciary relationship to plaintiff, in the preparation of such mortgage and escrow agreement, and acting as escrow holder, did fail, neglect and refuse to disclose, divulge or reveal to plaintiff such information.

XI.

That by reason of not disclosing such previous fraudulent transaction of said mining corporation, although having actual knowledge thereof, and by violation of the oral instructions of the plaintiff as hereinabove alleged and set forth, and by reason of the receipt of payment in full of its mortgage hereinabove described, by virtue of the \$10,000.00 loan made by plaintiff, the defendant bank, by and through its agent, Oliver T. Davis, did knowingly, wilfully, fraudulently and designedly, and with intent to defraud and deceive, did then and there defraud the plaintiff in the sum of Ten Thousand Dollars (\$10,000.00), and did violate its fiduciary relationship with plaintiff.

XII.

That, by reason of the fraudulent acts and omissions aforesaid of the defendant bank, by and through its agent, Oliver T. Davis, and in reliance

thereon, the plaintiff, being in good faith, and without knowledge of said fraudulent acts, and relying upon the good faith of the defendants, was induced to and did pay out, and has been deprived of, the sum of \$10,000.00.

XIII.

That, by reason of the willful and designed fraudulent acts and deceit of the said defendants, in defrauding plaintiff of the sum of \$10,000.00, as aforesaid, plaintiff is entitled to punitive and exemplary damages in the sum of Twenty-five Thousand Dollars (\$25,000.00).

XIV.

That in addition to the damages aforesaid by reason of the willful and designed fraudulent acts and deceit of the said defendants in defrauding plaintiff, the plaintiff has been compelled to employ attorneys to prosecute this action in his behalf, and has agreed to pay them a reasonable fee, and that a reasonable fee for the bringing of this action is Three Thousand Five Hundred Dollars (\$3,500.00).

Wherefore, Plaintiff prays for judgment against the above-named defendants as follows, to wit:

1. For the sum of Ten Thousand Dollars (\$10,000.00), principal;
2. For the sum of Twenty-five Thousand Dollars (\$25,000.00) for punitive and exemplary damages;
3. For the sum of Three Thousand Five Hun-

dred Dollars (\$3,500.00) for attorney fees in said action;

4. For costs of this action and for such other and further relief as to the Court may seem just and proper in the premises.

/s/ HENRY McQUADE,
Attorney at law;

/s/ R. DON BISTLINE,
Attorney at Law; Attorneys
for the Plaintiff.

State of Arkansas,
County of Gill—ss.

Howard M. Courtney, being first duly sworn upon his oath, deposes and says:

That he is the plaintiff named in the within-entitled action; that he has read the above and foregoing Complaint and knows the contents thereof, and that the facts therein stated are true, as he verily believes.

/s/ HOWARD M. COURTNEY.

Subscribed and Sworn to before me this 9th day of January, 1950.

[Seal] /s/ H. C. SCOTT,
Notary Public.

Commission Exp.: 8/18/51.

[Endorsed]: Filed January 13, 1950.

[Title of District Court and Cause.]

MOTION FOR BILL OF PARTICULARS

The defendants herein move the court for an order requiring the plaintiff herein to furnish a bill of particulars in the following matters, to wit:

To set forth in sub-section 2 of paragraph IX the value of the property that should have been in said mortgage, namely:

One 1941 GMC Truck, Motor No. 27025819,
Serial No. 159729A2;

One 200 Amp. Lincoln portable welder,

and also to set forth in sub-section 3 of the same paragraph the value of the property described therein.

It is alleged in said sub-sections that certain property was omitted from the said mortgage and the property is described, but nowhere is it alleged the value of said property that was omitted, and by reason thereof one cannot ascertain the value of the remaining property so covered by said mortgage as distinguished from the value of the property that was omitted.

The defendants likewise move the Court for an order requiring the plaintiff to set forth when, in reference to the time of the drafting of the said mortgage, that he discovered that the property was not included in the said mortgage, that is, he

should allege with particularity when the alleged fraud was discovered.

Dated this 22nd day of February, 1950.

/s/ O. R. BAUM,

/s/ RUBY Y. BROWN,

Attorneys for the Defendants.

[Endorsed]: Filed February 23, 1950.

[Title of District Court and Cause.]

MOTION FOR MORE DEFINITE
STATEMENT

Come now the defendants, and each of them, and move the Court for an order requiring the plaintiff herein to give a more definite statement, and for reasons thereof state:

a. That nowhere in sub-section 2 of paragraph IX is the value of the property that should have been mortgaged, namely:

One 1941 GMC Truck, Motor No. 27025819,
Serial No. 159729A2;

One 200 Amp. Lincoln portable welder,

set forth, and likewise the value of the property set forth in sub-section 3 of the same paragraph is not set forth, and nowhere can one ascertain what the value of such property was so that one would know what the value of the remaining property that was mortgaged was.

b. The complaint sets forth that the plaintiff discovered that certain property was included in the mortgage, but nowhere does he allege when he discovered that certain property was not included in the said mortgage.

Dated this 23rd day of February, 1950.

/s/ O. R. BAUM,

/s/ RUBY Y. BROWN,

Attorneys for the Defendants, Residing at Pocatello,
Idaho.

[Endorsed]: Filed February 25, 1950.

[Title of District Court and Cause.]

ORDER

The defendants having heretofore filed and presented their motion for more definite statement and the matter having been argued by counsel for the respective parties, and the Court now being advised in the matter,

It Is Ordered that the said motion for more definite statement be and the same is granted and the Plaintiff is allowed ten days to amend the complaint to conform with this order.

Dated June 14, 1950.

CHASE A. CLARK,

United States District Judge.

[Endorsed]: Filed June 14, 1950.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes now the plaintiff and for cause of action against the defendants complains and alleges:

I.

That the plaintiff is now and at all times hereinafter mentioned has been a resident of the State of California.

II.

That the defendant Custer County Bank is an Idaho banking corporation, duly organized and existing under and by virtue of the laws of the State of Idaho and qualified to do business in the State of Idaho, with its principal place of business at Challis, Custer County, Idaho; that defendant Oliver T. Davis is now and at all times hereinafter mentioned was an officer of said corporation, acting in his employment as an agent and employee of said corporation, to wit: Cashier.

III.

That at the time and place hereinafter set forth, the Fourth of July Mining Company was an Idaho mining corporation organized and existing under and by virtue of the laws of the State of Idaho, with its principal place of business at Sunbeam, Idaho.

IV.

That on or about the 22nd day of November, 1946, the said Fourth of July Mining Company

made, executed and delivered to said defendant banking corporation its certain chattel mortgage on personal property, in the sum of Seven Thousand Five Hundred Dollars (\$7,500.00), which said mortgage is on record as Instrument No. 9490, 97777 of the records of Custer County, Idaho, filed for record November 25, 1946, in Book 8, Minutes of Mortgages on Personal Property, at page 166, covering the following described personal property, to wit:

One 40 to 50-ton Mill, complete, including:

- 1 Large ore crusher;
- 1 Fine ore crusher;
- 1 Ball Mill, complete;
- 1 40 HP engine;
- 1 3-cell flotation machine;
- 1 Single-cell flotation machine;
- 1 New generator and 12 motors, ranging from 30 HP down to 1½ HP;
- Blacksmith shop, complete;
- 1 Pelton wheel, complete, and all miscellaneous tools and fittings;
- All assay equipment;
- 1 Chicago pneumatic compressor, Serial 61879 (8033096);
- 10 Tons of rail;
- 5500 feet of pipe and fittings;
- 1 150 HP Diesel Motor, complete with direct-driven generator.

V.

That thereafter, but some time prior to September 23, 1947, that said defendant banking corporation, by and through its agent, Oliver T. Davis, learned, or was advised, or discovered, that certain property in the above-described mortgage on personal property did not belong to the mortgagors, that is, said Fourth of July Mining Corporation, said property being, to wit: a portion or all of the following described property:

One 40 to 50-ton Mill, complete, including:

- 1 Large ore crusher;
- 1 Fine ore crusher;
- 1 Ball-Mill, complete;
- 1 40 HP engine;
- 1 3-cell flotation machine;
- 1 Single-cell flotation machine;
- 1 Blacksmith shop, complete, less anvil;
- 10 Motors, ranging from 30 HP to 11½ HP;
- 1 150 HP Diesel Motor, complete with direct-driven generator;

that said banking corporation thereupon, by and through its agent, Oliver T. Davis, demanded of said mining corporation and its officers immediate payment of said above-described mortgage, and did further advise said mining corporation and its officers that, if payment was not made at once, criminal prosecution would be instituted under the laws of the State of Idaho against said corporation and its officers, for mortgaging property to which it did not have title, or which it did not own.

VI.

That after such threat of criminal prosecution by the said defendant banking corporation, by and through its agent, Oliver T. Davis, said mining corporation and its officers entered into negotiations with plaintiff for the loan of the sum of Ten Thousand Dollars (\$10,000.00); that plaintiff, without any knowledge of the facts set forth in paragraph V hereof, offered and agreed to loan said sum to said mining corporation provided said mining corporation would give as security to plaintiff for such loan a mortgage upon all the property that said mining corporation had at said time mortgaged to the defendant bank, together with certain additional property that said mining corporation had mortgaged to one Roy E. Bassett, said property mortgaged to Bassett being as follows, to wit:

One 1941 GMC Truck, Motor No. 27,025,819,

Serial No. 159729A2;

One 200 Amp. Lincoln portable welder.

VII.

That, for the purpose of consummating said transaction, plaintiff came to Challis, Idaho, and with the officers of said mining corporation, and on the 23rd day of September, 1947, went to the defendant bank and its agent, Oliver T. Davis, Cashier; that said bank and its agent, Oliver T. Davis, were engaged by plaintiff and said mining corporation to prepare the papers and handle the escrow and serve as escrow holder in connection with the preparation of the said mortgage for Ten

Thousand Dollars (\$10,000.00), and the disbursement of the sum of Ten Thousand Dollars (\$10,000.00) being loaned by plaintiff to said mining corporation.

That at said time and place the defendant corporation, by and through its agent, defendant Oliver T. Davis, well knew and was informed that the loan was being made by plaintiff to said mining corporation for the purpose of said mining corporation paying off the above-described mortgage obligation of said corporation to the bank; that said banking corporation, by and through its agent, Oliver T. Davis, further knew that the reason that said mining corporation was paying such obligation to defendant bank was that it, the said banking corporation, by and through its agent, Oliver T. Davis, had demanded payment from such mining corporation at once or criminal prosecution would be instituted against the mining corporation and its officers for mortgaging property not belonging to such mining corporation.

That further, and by reason of the fact that said defendant bank, by and through its agent, Oliver T. Davis, was employed and assumed the responsibility of preparing said mortgage, promissory note, assignment of lease agreement, mortgage release and escrow agreement, and was further employed to act as escrow holder, the said defendant bank and its agent, Oliver T. Davis, became fiduciary agents of plaintiff, and thereby were bound and required to advise, disclose, reveal and divulge to said plaintiff their interest in said proposed

loan of Ten Thousand Dollars (\$10,000.00) from plaintiff to said mining corporation, and all information concerning the mortgage of said mining corporation to the defendant bank, and knowledge of the unlawful mortgaging by said mining corporation of property it did not own; that the said defendant bank did not make such disclosures, but accepted such employment as herein set forth.

VIII.

That the defendant banking corporation, by and through its agent, Oliver T. Davis, was on the 23rd day of September, 1947, given the following instructions by plaintiff for the preparation of said mortgage and escrow agreement, to wit:

(a) Prepare a mortgage covering all property described in the mortgage hereinabove described as held by said defendant bank, and covering in addition thereto the property described in the mortgage held by said Roy A. Bassett, as hereinbefore described.

(b) Upon the execution of such mortgage on personal property and a promissory note secured by such mortgage, and the performance of other conditions hereinafter set forth, to pay over the sum of Ten Thousand Dollars (\$10,000.00), delivered by plaintiff to said defendant bank, to the said mining corporation.

(c) To prepare an escrow agreement, by the terms of which said bank was to act as escrow holder and hold an assignment of lease agreement made by said mining corporation

to plaintiff, and the aforesaid promissory note, and to disburse the said Ten Thousand Dollars (\$10,000.00).

(d) To record the mortgage and to prepare and obtain a release of the mortgage held by said defendant bank on the property of the said mining corporation.

IX.

That thereafter the said defendant bank, by and through its agent, Oliver T. Davis, in violation of the aforesaid instructions of the plaintiff and, further, without disclosing to plaintiff its knowledge or that of its agent, Oliver T. Davis, with respect to the mortgage held by it, wherein said mining corporation mortgaged property not belonging to it and, further, without disclosing the threat of criminal prosecution made by it through its agent, Oliver T. Davis, to said mining corporation and its officer, and acting as the fiduciary agent of plaintiff in the preparation of the mortgage and escrow agreement, did prepare such mortgage and did knowingly, fraudulently, and designedly, and with the intent to defraud and deceive plaintiff, prepare such mortgage contrary to the instructions of plaintiff, in the following particulars, to wit:

1. Prepared a mortgage covering the following described property, to wit:

- 1 Compressor, Chicago, 315 cu. ft., with 6-cylinder gas motor;
500 feet of air hose, 1¼ inch;

- 2 Stopers, Ingersoll-Rand, complete w/fittings;
- 1 Jack hammer, Ingersoll-Rand;
- 6 Sets steel for stopers;
- 1 Box diamond points;
- 15 Ton of rail;
- 4 Ore Cars;
 - 5,500 feet pipe and fittings;
- 1 Carriage car;
- 1 Air receiver tank, large;
- 2 Water receiver tanks;
- 2 Knockdown 54-bbl. tanks;
- 2 30-HP motors;
- 2 Wagon drills, Ingersoll-Rand;
- 1 Generator, 123 HP, powered by Pelton wheel, complete;
- 1 Large anvil;
- 20 Rolls tar paper;
- 1 Set pipe cutters and dies;
- 1 Paint spray outfit w/Curtis compressor;
 - Wisconsin motor, mounted on Menterden trailer;
- 1 Mill located on Buckeye mill site, adjacent to Yankee Fork in Custer County, Idaho;

Assay Equipment:

- 1 Rock crusher;
- 1 Braun pulverizer;
- 1 Furnace burner;
- 2 Small butane burners;
- 1 Butane regulator;

which said property did not then and does not

now have a value to exceed One Thousand Five Hundred Thirty-One Dollars (\$1531.00), in said mortgage as prepared by the defendant bank, through its agent, Oliver T. Davis, was the property described on a list furnished said Oliver T. Davis by said mining corporation by and through its agents, which list plaintiff had never been furnished and which the defendant bank, through its agent, Oliver T. Davis, knew had not been furnished to, nor exhibited to, plaintiff.

2. Prepared a mortgage contrary to the instructions of plaintiff, in that the following described property was omitted, to wit:

One 1941 GMC Truck, Motor No. 27,025,819,
Serial No. 159729A2;

One 200 Amp. Lincoln portable welder;

which property was of a minimum value of Two Thousand Five Hundred Dollars (\$2500.00), and which was the property described in that certain mortgage from the mining corporation to Roy A. Bassett, and was omitted, although defendant bank, by and through its agent, Oliver T. Davis, had been instructed by plaintiff to include such equipment in the mortgage being made and given as security for the loan of Ten Thousand Dollars (\$10,000.00), by plaintiff to said mining corporation.

3. Prepared a mortgage contrary to the instructions of plaintiff, in that the following described property was omitted, to wit:

One 40 to 50-ton Mill, complete, including:

- 1 Large ore crusher;
- 1 Fine ore crusher;
- 1 Ball-Mill, complete;
- 1 40-HP engine;
- 1 3-cell flotation machine;
- 1 Single-cell flotation machine;
- Blacksmith shop, complete;
- 1 150-HP Diesel motor, complete w/direct-driven generator;

which property was of a minimum value of Ten Thousand Fifty Dollars (\$10,050.00), which said property was described in that certain mortgage from the mining corporation to the defendant bank, and was omitted, although the defendant bank, by and through its agent, Oliver T. Davis, had been instructed by plaintiff to include all equipment in said mortgage from the mining company to said bank, in the mortgage being made from the mining company to plaintiff, as security for the loan of Ten Thousand Dollars (\$10,000.00), by plaintiff to said mining corporation.

X.

That, further, the said defendant bank, by and through its agent, Oliver T. Davis, well knowing that certain property described and mortgaged in the mortgage held by it from the said mining company did not belong to said mining company, and, further, well knowing that said bank, by and through its agent, Oliver T. Davis, had threatened

said mining corporation and its officers with criminal prosecution for mortgaging property not belonging to said mining corporation, if said mortgage was not paid, did knowingly, fraudulently and designedly, and with the intent to deceive, defraud and mislead plaintiff, and for its own gain and benefit, and although serving in a fiduciary relationship to plaintiff, in the preparation of such mortgage and escrow agreement, and acting as escrow holder, did fail, neglect and refuse to disclose, divulge or reveal to plaintiff such information.

XI.

That the value of property in said mortgage became known to the plaintiff on or about the 1st day of August, 1948, and did not prior to that time know that his instructions to the defendant, Oliver T. Davis, were miscarried until said date and that since the 23rd day of September, 1947, the property listed in said mortgage executed by the defendant, Oliver T. Davis, has since become worthless without any fault on the part of the plaintiff and further that the property so included in said mortgage prepared by the said Oliver T. Davis, was never of a value in excess of One Thousand Five Hundred Thirty-One Dollars (\$1531.00); and further, that the property fraudulently excluded from said mortgage prepared by said Oliver T. Davis was of the value of Twelve Thousand Five Hundred Fifty Dollars (\$12,550.00).

That by reason of not disclosing such previous fraudulent transaction of said mining corporation,

although having actual knowledge thereof, and by violation of the oral instructions of the plaintiff as hereinabove alleged and set forth, and by reason of the receipt of payment in full of its mortgage hereinabove described, by virtue of the Ten Thousand Dollars (\$10,000.00) loan made by plaintiff, the defendant bank, by and through its agent, Oliver T. Davis, did knowingly, wilfully, fraudulently and designedly, and with intent to defraud and deceive, did then and there defraud the plaintiff in the sum of Ten Thousand Dollars (\$10,000.00) and did violate its fiduciary relationship with plaintiff.

XII.

That, by reason of the fraudulent acts and omissions aforesaid of the defendant bank, by and through its agent, Oliver T. Davis, and in reliance thereon, the plaintiff, being in good faith, and without knowledge of said fraudulent acts, and relying upon the good faith of the defendants, was induced to and did pay out, and has been deprived of, the sum of Ten Thousand Dollars (\$10,000.00).

XIII.

That, by reason of the wilful and designed fraudulent acts and deceit of the said defendants in defrauding plaintiff of the sum of Ten Thousand Dollars (\$10,000.00) as aforesaid, plaintiff is entitled to punitive and exemplary damages in the sum of Twenty-Five Thousand Dollars (\$25,000.00).

XIV.

That in addition to the damages aforesaid, by reason of the willful and designed fraudulent acts and deceit of the said defendants in defrauding plaintiff, the plaintiff has been compelled to employ attorneys to prosecute this action in his behalf, and has agreed to pay them a reasonable fee, and that a reasonable fee for the bringing of this action is Three Thousand Five Hundred Dollars (\$3,500.00).

Wherefore, Plaintiff pays for judgment against the above-named defendants as follows, to wit:

1. For the sum of Ten Thousand Dollars (\$10,000.00), principal;
2. For the sum of Twenty-Five Thousand Dollars (\$25,000.00) for punitive and exemplary damages;
3. For the sum of Three Thousand Five Hundred Dollars (\$3,500.00) for attorney fees in said action;
4. For costs of this action and for such other and further relief as to the Court may seem just and proper in the premises.

Dated this .. day of July, 1950.

/s/ HENRY McQUADE,
Attorney for Plaintiff.

/s/ R. DON BISTLINE,
Attorney for Plaintiff.

State of Idaho,
County of Bannock—ss.

Personally appeared before me, Henry McQuade and R. Don Bistline, attorneys in the foregoing action, and being first duly sworn, depose and say as follows: That they have read the contents in this Amended Complaint and according to their best information, belief and knowledge, represent that the facts are true, and that they as attorneys for the plaintiff, Howard M. Courtney, do verify this Amended Complaint on behalf of said plaintiff for the following reason: That the said plaintiff is a resident of the State of California and is presently in the State of Arkansas and is, therefore, unable to sign this Amended Complaint in his own behalf.

/s/ R. DON BISTLINE,

/s/ HENRY McQUADE,

Attorneys for Plaintiff.

Subscribed and Sworn to before me this 17th day of July, 1950.

[Seal] /s/ F. E. TYDEMAN,
Notary Public.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 19, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant, Custer County Bank, an Idaho Banking Corporation, and moves the Court for an order dismissing the above-entitled action and for reasons thereof states:

I.

That the said Amended Complaint does not state facts sufficient to constitute a claim in favor of the plaintiff and against the defendant, Custer County Bank, an Idaho Banking Corporation.

Dated this 2nd day of August, 1950.

/s/ O. R. BAUM,

/s/ RUBY Y. BROWN,

Attorneys for the Defendant, Custer County Bank,
an Idaho Banking Corporation.

[Endorsed]: Filed August 3, 1950.

[Title of District Court and Cause.]

MOTION TO STRIKE

Comes now the defendant, Custer County Bank, an Idaho Banking Corporation, and moves the Court for an order striking from said Amended Complaint the following:

I.

That part of Paragraph V of said Amended

Complaint, found on page 3 thereof, reading as follows:

“and did further advise said mining corporation and its officers that, if payment was not made at once, criminal prosecution would be instituted under the laws of the State of Idaho against said corporation and its officers, for mortgaging property to which it did not have title, or which it did not own.”

for the following reasons:

(a) That the said statement is too indefinite and insufficient and does not contribute anything to asserting a claim against the defendant, Custer County Bank, an Idaho Banking Corporation.

(b) That the same is redundant and immaterial and contains no facts pertinent to said attempt to state a claim against the defendant, Custer County Bank, an Idaho Banking Corporation.

II.

Likewise moves the Court for an order striking from Paragraph IX, as found on page 5, the words:

“without disclosing the threat of criminal prosecution made by it through its agent, Oliver T. Davis,”

for the following reasons:

(a) That the said statement is too indefinite and insufficient and does not contribute anything to asserting a claim against the defendant, Custer County Bank, an Idaho Banking Corporation.

(b) That the same is redundant and immaterial and contains no facts pertinent to said attempt to state a claim against the defendant, Custer County Bank, an Idaho Banking Corporation.

III.

Likewise moves the Court for an order striking from Paragraph X, as found on page 7, the following:

“and further well knowing that said bank, by and through its agent, Oliver T. Davis, had threatened said mining corporation and its officers with criminal prosecution for mortgaging property not belonging to said mining corporation,”

for the following reasons:

(a) That the said statement is too indefinite and insufficient and does not contribute anything to asserting a claim against the defendant, Custer County Bank, an Idaho Banking Corporation.

(b) That the same is redundant and immaterial and contains no facts pertinent to said attempt to state a claim against the defendant, Custer County Bank, an Idaho Banking Corporation.

Dated this 2nd day of August, 1950.

/s/ O. R. BAUM,

/s/ RUBY Y. BROWN,

Attorneys for Defendant, Custer County Bank, an
Idaho Banking Corporation.

[Endorsed]: Filed August 3, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant, Oliver T. Davis, and moves the Court for an order dismissing the above-entitled action, and for reasons thereof states:

I.

That the said Amended Complaint does not state facts sufficient to constitute a claim in favor of the plaintiff and against the defendant, Oliver T. Davis.

Dated this 2nd day of August, 1950.

/s/ O. R. BAUM,

/s/ RUBY Y. BROWN,

Attorneys for the Defendant,
Oliver T. Davis.

[Endorsed]: Filed August 3, 1950.

[Title of District Court and Cause.]

MOTION TO STRIKE

Comes now the defendant, Oliver T. Davis, and moves the Court for an order dismissing the above-Amended Complaint the following:

I.

That part of Paragraph V of said Amended Complaint, found on page 3 thereof, reading as follows:

“and did further advise said mining corpora-

tion and its officers that, if payment was not made at once, criminal prosecution would be instituted under the laws of the State of Idaho against said corporation and its officers, for mortgaging property to which it did not have title, or which it did not own."

for the following reasons:

(a) That the said statement is too indefinite and insufficient and does not contribute anything to asserting a claim against the defendant, Oliver T. Davis.

(b) That the same is redundant and immaterial and contains no facts pertinent to said attempt to state a claim against the defendant, Oliver T. Davis.

II.

Likewise moves the Court for an order striking from Paragraph IX, as found on page 5, the words:

"without disclosing the threat of criminal prosecution made by it through its agent, Oliver T. Davis,"

for the following reasons:

(a) That the said statement is too indefinite and insufficient and does not contribute anything to asserting a claim against the defendant, Oliver T. Davis.

(b) That the same is redundant and immaterial and contains no facts pertinent to said attempt to state a claim against the defendant, Oliver T. Davis.

III.

Likewise moves the Court for an order striking from Paragraph X, as found on page 7, the following:

“and further well knowing that said bank, by and through its agent, Oliver T. Davis, had threatened said mining corporation and its officers with criminal prosecution for mortgaging property not belonging to said mining corporation,”

for the following reasons:

(a) That the said statement is too indefinite and insufficient and does not contribute anything to asserting a claim against the defendant, Oliver T. Davis.

(b) That the same is redundant and immaterial and contains no facts pertinent to said attempt to state a claim against the defendant, Oliver T. Davis.

Dated this 2nd day of August, 1950.

/s/ O. R. BAUM,

/s/ RUBY Y. BROWN,

Attorneys for Defendant,
Oliver T. Davis.

[Endorsed]: Filed August 3, 1950.

[Title of District Court and Cause.]

ORDER

Motion to Strike and Motion to Dismiss having heretofore been filed by each of the defendants in the above-entitled cause and the Court having heard oral argument and having asked for briefs; counsel for the respective parties having filed their briefs and the Court having considered the matter and being advised,

It Is Ordered that the motions be and each of them is hereby overruled without prejudice and the matters raised by the motions will be considered by the Court upon the trial of the cause upon its merits.

Defendants may have twenty days in which to file their answer.

Dated March 13, 1951.

/s/ CHASE A. CLARK,

United States District Judge.

[Endorsed]: Filed March 13, 1951.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Come now the defendants and as and for their Answer to the Amended Complaint of the plaintiff herein allege, affirm and deny as follows:

First Defense

I.

That the said Amended Complaint fails to state a claim against the defendants or either of them upon which relief can be granted.

Second Defense

I.

Defendants deny each and every allegation in said Amended Complaint contained, save and except those particular allegations hereinafter specifically admitted.

II.

Admit the allegations of paragraphs II, III and IV.

III.

Answering paragraph V defendants admit that some time prior to September 23, 1947, the defendant Banking Corporation learned, or was advised, that certain of the property described in the said mortgage so held by it, and referred to in paragraph IV, did not belong to the said mortgagor, and admits that upon so learning that fact, the said note being due, requested immediate payment of

the moneys due it, as evidenced by said note, the payment of which was secured by said mortgage, but denies that said Mining Company and its officers were advised at that time, or at any other time, that if payment was not made at once criminal prosecution would be instituted under the laws of the State of Idaho against said corporation and its officers for mortgaging said property to which it did not have title, or which it did not own.

IV.

Answering paragraph VI your defendant denies the allegations therein contained.

V.

Answering paragraph VII your defendants deny each and every allegation therein contained, and state the facts to be that on or about the 23rd day of September, 1947, the said officers of the said Fourth of July Mining Company came into the office of the defendant Custer County Bank, a corporation, at which time they were accompanied by the said plaintiff Courtney, and that at that time said officers of the said Fourth of July Mining Company, in the presence of Courtney, advised the said defendant, Oliver T. Davis, that said plaintiff Courtney was going to make said corporation a loan in the sum of \$10,000.00 and that out of such sum the said Mining Company was going to pay the amount due the bank, and that such officers at such time requested the defendant, Oliver T. Davis, as an individual, to prepare a mortgage covering

certain property as shown on a list of property which was handed to the said Oliver T. Davis, and that the said Oliver T. Davis did prepare a mortgage covering the property so set forth in such list, and that at all times in said conversation between said officers of the Mining Company and the said Oliver T. Davis it was stated that the said Custer County Bank would be paid the amount of money due it out of the moneys that were being loaned by the plaintiff Courtney to said Mining Company, and that said plaintiff at all times was present during the times of such conversation and heard such conversation and looked over said mortgage after the same was drafted. That after said mortgage was completed the said officers of said Mining Corporation directed some additional property be added, which was added in the presence of the plaintiff Courtney.

VI.

Answering paragraph VIII deny the allegations therein contained and state the facts to be that the said officers of the said Fourth of July Mining Company, a corporation, in the presence of the plaintiff Courtney, gave to the said Oliver T. Davis, one of the said defendants herein, a list of the property to be mortgaged, and asked that a mortgage be prepared, and that a mortgage was prepared in accordance with the request of said officers, covering the property contained on said list, and after the same was prepared at the request of the officers of said Mining Corporation additional prop-

erty was added, and that the only directions that your said defendant, Oliver T. Davis, ever received were as herein stated, together with the additional instructions to record said mortgage, and that at that time and place there was deposited to plaintiff's account and then to the account of the Fourth of July Mining Company the sum of money so loaned by the said Courtney to the said Mining Company, and the said Mining Company issued a check to said defendant bank in payment of its said indebtedness, and that escrow papers were drafted in accordance with the directions of said parties, and that at all times the said defendants, and each of them, have carried out said escrow directions.

VII.

Answering paragraphs IX and X your defendants deny the allegations in each paragraph contained.

VIII.

Answering paragraph XI defendants deny the allegations therein contained and state that the said property as described in said mortgage was of a value far in excess of the amount of the said mortgage indebtedness.

IX.

Answering paragraph XII defendants deny the allegations therein contained.

X.

Answering paragraph XIII your defendants deny that by reason of the willful and designed fraudu-

lent acts and deceit of said defendants in defrauding plaintiff of the sum of \$10,000.00 as aforesaid, plaintiff is entitled to punitive and exemplary damages in the sum of \$25,000.00, or any other sum, or any other amount, and state that at no time, or at all, did the said defendants, or either of them, ever practice any willful or fraudulent acts or deceit upon said plaintiff, and deny specifically that he was damaged in the sum of \$10,000.00 or any other sum, or at all.

XI.

Answering paragraph XIV your defendants deny the same.

Affirmative Defense

I.

Defendants allege that in accordance with the allegations in paragraph XI plaintiff admits that he had notice of the fact that his alleged instructions had not been carried out and that he did not have the property described in his said mortgage that he alleges was to be included therein; likewise plaintiff alleges that on or about such date he knew of the fact that the said property, as he alleges, was not of sufficient value to cover his indebtedness, and that notwithstanding such knowledge he, the said plaintiff, refrained from commencing this action until the 13th day of January, 1950, and that in the meantime the said property that he did have the mortgage upon was wasted, destroyed, moved away or dispersed, and that considerable of it was sold for taxes, and that he,

by his own laches deprived himself of his said security, and that he has thereby been guilty of laches and such in equity barred the plaintiff from maintaining this action.

Second Affirmative Defense

I.

Plaintiff, after making said loan to said Fourth of July Mining Company, and as and when the same became due made an extension of the same and received a consideration therefor and accepted certain properties as a consideration for granting such extension, and by reason of the facts of the said plaintiff in so doing, as herein set forth, he, the said plaintiff, is estopped from asserting any claim against said defendants or either of them.

Third Affirmative Defense

I.

That the said security so held by the said plaintiff was of adequate and of sufficient value that if it had been preserved and taken care of that it would have, upon forced sale, brought sufficient money to retire the indebtedness due said plaintiff, but that said plaintiff was advised that the said company was not active, and knew, or should have known, that the said property was being wasted, subject to the elements and was not being cared for, and that the same would become lost, stolen or carried away, and that he took no affirmative actions to protect himself in any manner whatso-

ever, and that the said taxes were permitted to accumulate on said property and that a writ of distraint for delinquent taxes was issued and that a considerable part, if not all, or at least that property that could be found, was sold, as is commonly referred to, for taxes, and that if plaintiff was damaged in any sum of money whatsoever such damage was occasioned by his own acts of negligence and not otherwise.

Fourth Affirmative Defense

I.

Defendants and each of them allege that notwithstanding that the said plaintiff alleges he became aware of the conditions existing as to the value and the type of and kind of property that was in his said mortgage, the said plaintiff did not take any steps or any action to protect himself, and that the said property was subject to assessment under the laws of the State of Idaho, and that taxes on a considerable portion thereof, if not all of the same, were permitted to become delinquent, and that a writ of distraint was issued by the proper authorities of the County of Custer, State of Idaho, and that said property was disposed of under the provisions of the laws of the State of Idaho relating to the sale of property where taxes are permitted to go delinquent, and that the said property became of no value to said plaintiff by reason of the failure of the said Fourth of July Mining Company and the said plaintiff to properly protect said security.

Wherefore, Defendants, and each of them, having fully answered, pray that they may be dismissed with their costs and that the said plaintiff take nothing by reason of said Amended Complaint.

/s/ O. R. BAUM,

Residing at Pocatello, Idaho,

/s/ RUBY Y. BROWN,

Residing at Pocatello, Idaho,

Attorneys for Defendants.

[Endorsed]: Filed April 10, 1951.

United States District Court for the District
of Idaho, Eastern Division
No. 1598

HOWARD M. COURTNEY,

Plaintiff,

vs.

CUSTER COUNTY BANK, an Idaho Banking
Corporation, and OLIVER T. DAVIS,
Defendants.

VERDICT

We, the jury in the above-entitled cause, find for the defendants Custer County Bank, an Idaho Banking Corporation, and Oliver T. Davis, and against the plaintiff.

/s/ MRS. ALBERT McINTYRE,
Foreman.

[Endorsed]: Filed May 17, 1951.

United States District Court for the District
of Idaho, Eastern Division

No. 1598

HOWARD M. COURTNEY,

Plaintiff,

vs.

CUSTER COUNTY BANK, an Idaho Banking
Corporation, and OLIVER T. DAVIS,
Defendants.

JUDGMENT

This cause came on for trial before the Court and jury, both parties appearing by counsel, and the issues having been duly tried and the jury having rendered a verdict for the defendants.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged that the plaintiff take nothing upon his complaint herein, and that the defendants have and recover from the plaintiff their costs and disbursements incurred herein, taxed in the sum of \$218.90.

Witness the Honorable Chase A. Clark, Judge of said court, and the seal thereof, this 17th day of May, 1951.

[Seal] /s/ ED. M. BRYAN,
Clerk.

[Endorsed]: Filed May 17, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Howard M. Courtney, the plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 17, 1951.

/s/ HOWARD M. COURTNEY,
Plaintiff and Appellant.

/s/ R. DON BISTLINE,
Attorney for Plaintiff and
Appellant.

[Endorsed]: Filed June 13, 1951.

[Title of District Court and Cause.]

MOTION AND ORDER

Comes now the above-named plaintiff by and through his attorney, R. Don Bistline, and respectfully requests additional time in the amount of 50 days in which to perfect appeal in the above-entitled matter, and respectfully represents that since the filing of said appeal said transcript has not been prepared, and further that counsel has been ill for a period of three weeks.

Dated this 17th day of July, 1951.

/s/ R. DON BISTLINE,
Attorney for Plaintiff and
Appellant.

ORDER

Upon the reading of the foregoing motion, and good cause appearing therefor,

It Is Hereby Ordered That Plaintiff be and he is hereby granted 50 additional days in which to perfect appeal in said above-entitled matter to the Circuit Court of Appeals for the Ninth Circuit.

Dated July 18th, 1951.

/s/ CHASE A. CLARK,
U. S. District Judge.

[Endorsed]: Filed July 18, 1951.

United States District Court, for the District of
Idaho, Eastern Division

HOWARD M. COURTNEY,

Plaintiff,

vs.

CUSTER COUNTY BANK, an Idaho Banking
Corporation, and OLIVER T. DAVIS,
Defendants.

TRANSCRIPT

This matter came on for trial before the Honorable Chase A. Clark, United States District Judge, sitting with a jury at Pocatello, Idaho, on May 17th, 1951

APPEARANCES

HENRY McQUADE, Esquire,
Pocatello, Idaho.

R. DON BISTLINE, Esquire,
Pocatello, Idaho,

Attorneys for the Plaintiff.

O. R. BAUM, Esquire,
Pocatello, Idaho.

RUBY Y. BROWN,
Pocatello, Idaho,

Attorneys for the Defendants.

May 17th, 1951, 10:00 o'Clock A.M.

(Jury called and sworn.)

(Opening statement by Mr. Bistline.)

Mr. Bistline: We would like to call Mr. Davis
for examination under the statute.

The Court: Very well.

OLIVER T. DAVIS

called as a witness by the plaintiff, for cross-examination under the statute, after being first duly sworn testifies as follows:

Cross-Examination

By Mr. Bistline:

Q. You are the cashier of the Custer County
Bank? A. Yes, sir.

(Testimony of Oliver T. Davis.)

Q. Were you cashier of the Custer County Bank in September, 1947? A. Yes, sir.

Q. How long before that had you been cashier?

A. Since approximately the first of March, 1947.

Q. You are familiar with the Fourth of July Mining Company? A. Yes, sir.

Q. At that time the Mining Company had made a loan from the bank? A. Prior to that time.

Q. Do you know the amount of that loan?

A. At what time?

Q. At the time the Mining Company first made it? A. \$5,000.00.

Q. And was that renewed?

A. That was in July of 1946 and was cancelled and a new loan for a larger amount made, I believe in October or September of 1946. The first loan was cancelled and the mortgage cancelled and a new loan made some three months after the first one.

Q. And what was the amount of the new loan?

A. That was \$6,000.00.

Q. The Bank took a mortgage and security for the loan on property of the mining company?

A. The second loan?

Q. Yes. A. Yes, sir, they did.

Q. Did you subsequently discover that some of the mortgaged property didn't belong to the Mining Company?

Judge Baum: That is objected to, it is not peculiarly within the knowledge of the witness and I understand he is on cross-examination.

(Testimony of Oliver T. Davis.)

The Court: I think he may answer, the rule is not just as the rule in the State Court.

A. I was told that the property on the mortgage did not belong to the Fourth of July Mining Company.

Q. When were you told that?

A. It was in the spring of 1947, the late spring, it was probably May or June.

Q. Were you told what property did not belong to the Mining Company? A. Yes, sir. [2*]

Q. What property was that; that is, the property in the mortgage?

A. I cannot at this time list that property correctly but it was certain property—mineral mill machinery which was in the building which I understood was the property of the company. There were certain items, flotation cells, a ball mill, and a crusher—I have a list of that property but I cannot give it to you from memory right now.

Q. Do you have that available?

A. Yes, I have it in the files somewhere.

Mr. Bistline: May the witness get that list, if the Court please.

The Court: Yes, he can refresh his memory from any list that he has.

A. This is a note that I made at the time that I was informed about this property on our mortgage, these are my original notes.

Q. You mean after you had taken the mortgage?

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Oliver T. Davis.)

A. The mortgage was made in October, 1946, and this was the following spring when one of the parties who claimed to own this property came into the bank and told me that he and his partner owned this property—there were two crushers, a ball mill, a three cell flotation machine, and a one cell flotation machine.

Q. Who were the parties who advised you of their ownership of the property?

A. Troy Becker. [3]

Q. Did you verify that fact?

A. I had no means of verifying it—I had no access to any documents which would show it. However, Mr. Becker displayed to me a contract for the sale of certain items to the Fourth of July Mining Company and these documents which he showed me listed these items that he reported to me that had never been paid for, that they had never completed the payment under this purchase agreement, and that therefore it didn't belong to the mining company but to him and his associate.

Q. And was his associate Ream Snyder?

A. Yes, sir.

Judge Baum: We object to—I will withdraw that objection—you may go ahead.

Q. Upon receiving that information what action did you take with respect to the Fourth of July Mining Company?

A. We wrote to Mr. Johnson who was an officer of the company and requested him to come to the bank; that I had received some information relative

(Testimony of Oliver T. Davis.)

to the property mortgaged and that I would like to talk to him.

Q. Did Mr. Johnson come in? A. Yes, sir.

Q. And then what happened?

Judge Baum: Now I am sure this is not peculiarly within the knowledge of this witness. [4]

The Court: I understand the rule in this Court is somewhat different and I have said so. I understand that the rule in the State Court does not apply here and that you can call a witness regardless of whether the information is in the hands of other people. I think this conversation would be entirely immaterial at this time. I don't know what he will testify to, but if there is no further objection I will let him answer.

Judge Baum: I do object to its being immaterial and hearsay.

The Court: The objection is sustained.

Mr. Bistline: One of the purposes of this is that we have alleged that there was a threat made by the bank to some member of the corporation——

The Court: That would have nothing to do with your client. After it was discovered that the mortgage was not on property owned by the company I don't think that it would be material at this time. I should also instruct the jury to disregard any remarks of counsel and the court in ruling at this time that those remarks should go out, and the jury should get no inference from any remarks of counsel that any threats were made by anyone to or against anyone.

(Testimony of Oliver T. Davis.)

Q. Following this discovery what effort did the bank make to collect the mortgage? [5]

A. They had made efforts to collect on the mortgage prior to that time.

Q. Had the bank attempted foreclosure?

A. The bank never attempted foreclosure on that mortgage.

Q. As cashier of the bank did you make any evaluation of the property that had been mortgaged to you?

A. I wasn't employed by the bank at the time the mortgage was made—to answer your question, I did not.

Q. At the time you attempted to collect the loan did you make any evaluation of the security?

A. I did not.

Q. Are you familiar with the security?

A. What do you mean?

Q. Do you know what the security consisted of and the probable value?

A. I had the property as listed on the mortgage which was held by the bank at the time that I assumed the position with the bank. I do not have a personal knowledge of that equipment with a very few exceptions. I am not qualified to state the value of the mining machinery. At that time I did not have any personal knowledge of either the equipment or a fair valuation of the equipment; all I had was a financial statement placed on file as is customary when a loan is made.

Q. From the time of the discovery that property

(Testimony of Oliver T. Davis.)

was mortgaged to you that did not belong to the Fourth of July Mining Company, [6] the only effort you made was to collect the loan?

A. That is correct; this loan—at the time I discovered they were already considerably past due, I had previously requested payment as a past due note. I continued to press for collection of the loan since it was overdue. The matter of courtesy to our borrower the loan had been renewed past its due date.

Q. As cashier of the bank did you consider that a bad loan?

Judge Baum: That is objected to as immaterial.

The Court: The objection is sustained.

Q. Had you ever met Mr. Courtney before the day the loan was made? A. No, sir.

Q. What time did Mr. Courtney come to the bank? A. I think it was about noon.

Q. And how long was he there?

A. Well, there were several in the party with Mr. Courtney. Several of them; that is, various ones came in and went out. I would say that Mr. Courtney and most of the party were there for a period of about two or two and one-half hours.

Q. Now, Mr. Davis, Mr. Courtney and the Mining Company came to you to prepare papers in connection with a new loan?

A. Mr. Courtney came, Mr. Haygood, Bassett, and Johnson of the Fourth of July Mining Company that I was acquainted with.

(Testimony of Oliver T. Davis.)

Q. At that time you were requested to prepare papers for a new loan? [7]

A. After the customary introduction and explanation, yes.

Q. At that time you agreed with Mr. Courtney to act as the escrow holder in connection with the new loan?

A. We were requested to act as escrow holder and we accepted.

Q. Was an escrow agreement prepared at that time? A. Yes, sir.

Q. Now, then, handing you what has been marked as Plaintiff's Exhibit No. 1, I will ask you if that is the escrow agreement or one of the copies of the agreement prepared at that time?

A. Yes, I believe that is the Grantor's copy of the escrow agreement prepared at that time—it appears to be.

Q. Is that your signature?

A. My signature appears twice.

Q. Does it appear as accepting the escrow agreement? A. For the bank, yes.

Q. The bank did accept that responsibility?

A. As escrow holder.

Q. For both parties concerned?

A. Yes, sir.

Q. And for the Mining Company, is that right?

A. Yes, sir.

Mr. Bistline: At this time we offer in evidence Plaintiff's Exhibit No. 1.

Judge Baum: May we have the original? [8]

(Testimony of Oliver T. Davis.)

Mr. Bistline: I have never seen the original.

Judge Baum: Then may we have the deposition as taken in the matter?

The Court: The deposition may be published, and it is so ordered.

Mr. Bistline: We have no objection to that.

Judge Baum: We have no objection to this exhibit.

The Court: It may be admitted.

Q. During the time that Mr. Courtney was present at the bank that day, that is, during the time that the agreement was prepared or at any time did you ever advise Mr. Courtney that the bank had property on the mortgage that did not belong to them, that had been mortgaged to the bank as property of the Fourth of July Mining Company?

Judge Baum: We object to that as immaterial.

The Court: That objection is sustained.

Q. Did you ever advise Mr. Courtney that the bank had a bad loan?

Judge Baum: That is objected to as incompetent, irrelevant and immaterial.

The Court: That objection is sustained.

Q. Did Mr. Courtney give you any instructions concerning the preparation of papers in connection with this loan? A. Very little, if any.

Q. What instructions did he give you? [9]

A. The only specific instruction that I recall at this time that he gave was after the preparation of the papers, he requested that I ascertain at the

(Testimony of Oliver T. Davis.)

court house through the lien certificates that the property was clear.

Q. Did you—or rather, did Mr. Courtney tell you at that time that he wanted a mortgage on all of the property of the Fourth of July Mining Company? A. No.

Q. Did he tell you at that time that he wanted a mortgage on the property of the Fourth of July Mining Company—the same property that the bank had on their mortgage? A. No, sir.

Q. You prepared a note and mortgage?

A. Yes, sir, a note and mortgage.

Q. And did you prepare any other instruments?

A. An escrow agreement.

Q. Did you prepare an assignment of the mining claims or leases? A. I did not.

Q. Did Mr. Courtney request an assignment of the claims as part of the security?

A. I don't know whether he requested that or not. All that I know is that I was requested to prepare such an assignment and that I refused to do so.

Q. Do you know who prepared the assignment?

A. I do not. [10]

Q. Was such an assignment prepared?

A. Yes, and it is a part of the documents held in escrow and was listed on that copy of the escrow agreement that I had in my hand.

Q. When was the escrow papers prepared?

A. On the same day as the rest of them, the same afternoon.

(Testimony of Oliver T. Davis.)

Q. Were any other papers required to be in escrow?

A. The note, assignment, mortgage, and a copy of the extract of the minutes of the board of directors of the Fourth of July Mining Company, and the corporate resolution authorizing the President and the Vice-President to make the transaction. I think there was also placed in escrow with the assignment and note for \$10,000.00, the mortgage which was not listed as one of the documents in the escrow.

Q. Did you prepare the mortgage?

A. Yes, I did.

Q. Where is the mortgage now?

A. It is on file in the office of the County Recorder of Custer County.

Q. The original is in your file? A. Yes.

Q. Did you make a copy of the mortgage at the time you prepared it? A. Yes, sir, one copy.

Q. Where is that copy? [11]

A. I think my counsel would have to answer that. I believe it is with these documents accompanying the deposition of Mr. Johnson, but I am not sure.

Q. So far as you know it would be with the deposition. Did you have possession up to the time that counsel took it?

A. Yes, up to the time that I gave it to counsel.

Q. Did you ever furnish Mr. Courtney with a copy of that mortgage?

A. I cannot say for sure but I think not.

(Testimony of Oliver T. Davis.)

Q. Did he request a copy?

A. Not to my knowledge.

Q. Were you to furnish him a copy as per your understanding? A. Not to my knowledge.

Q. Isn't it a fact that about August, 1948, Mr. Courtney came to the bank and requested a copy?

A. Mr. Courtney came to the bank in August, 1948. I do not remember his requesting a copy because if he had I could have furnished him one at that time.

Q. Did you have a discussion with Mr. Courtney at that time regarding the mortgage?

A. I think that he asked to look at it.

Q. And did he look at it?

A. Yes, I think he did.

Q. Did he direct your attention to the fact that certain items were not in that mortgage?

A. He did not. [12]

Q. A 130 horse power diesel motor?

A. No.

Q. Among other papers turned to you at the time of this escrow, was there a check by Mr. Courtney? A. That is correct.

Q. A check for how much?

A. A check for \$10,000.00.

Q. Did Mr. Courtney give instructions in regard to that?

A. Mr. Courtney endorsed the check and I deposited it to his account.

Q. Did he furnish you with another check payable to the Fourth of July Mining Company?

(Testimony of Oliver T. Davis.)

A. He did not; he gave the check to the officers of the Mining Company.

Q. It was not placed in your hands?

A. It was placed in the hands of the Fourth of July Mining Company.

Q. At what time?

A. At the time Mr. Johnson gave me a \$10,000.00 draft by the Bank of America.

Q. Do you know to whom the check was delivered—to which officer of the Fourth of July Mining Company?

A. No, I don't. It was simply handed to one of them and they endorsed it and it was given to me to deposit to the credit of the Fourth of July Mining Company. [13]

Q. On that date? A. Yes, sir.

Q. You are positive that you never had that in your possession except as it cleared the bank?

A. Which check is that?

Q. Payable to the Fourth of July Mining Company? A. The bank had it for clearance.

Q. But not otherwise? A. That is right.

Q. Are you positive that check was not turned over to you to be held until all the papers were in the file——

A. No, sir, the check was handed to me for deposit. It was not cleared for two days, and such check was not held as a part of the escrow; the check was held as a cash item for collection and was held in the general accounts of the bank until we could get clearance from the issuing bank that the

(Testimony of Oliver T. Davis.)

draft was payable at, at which time the check was entered on the deposit to Mr. Courtney's account which was the second day thereafter.

Q. There may be some misunderstanding, Mr. Davis. You received a draft from Courtney deposited to his account? A. Yes, sir.

Q. That was one check for \$10,000.00?

A. Yes, sir.

Q. That was a cashier's check?

A. The draft on a Seattle bank, I believe, being a branch of the Bank of America in California. [14]

Q. That was deposited to Mr. Courtney's account?

A. He was not given immediate credit. We held the check—we held the draft until we received wire clearance on it, so it was in the bank's possession until the Bank of California cleared it by wire.

Q. And then a check to the Fourth of July Mining Company as distinguished from the draft was given to the Mining Company?

A. Yes, sir.

Q. And they deposited it? A. Yes, sir.

Q. And it was held until you had clearance on the draft?

A. Yes, sir, because Mr. Courtney's check was dependent on his bank honoring that draft.

Q. And at this time the bank received payment of their \$7500.00 loan? A. Yes, sir.

Q. As soon as the draft was honored?

A. The check was made out at the same time as Mr. Courtney's check to the company; it likewise

(Testimony of Oliver T. Davis.)

had to be held for the clearance—depending on the clearance of the draft.

Q. One of the instructions by Mr. Courtney was to check the county records to ascertain if there were any liens against the property being mortgaged? A. That is correct. [15]

Q. When did you accomplish that?

A. I would have to check for the exact date. However, I think it was the following day which would be the 24th. I think I did that the next day.

The Court: Do you have the lien certificate?

Judge Baum: Yes.

A. It was either the next day or the day following that.

Judge Baum: I think it was the same day.

Q. And you thereafter advised Mr. Courtney that you had complied with those instructions?

A. Yes, I did.

Q. Handing you what has been marked as Plaintiff's Exhibit No. 2, I will ask you if that is addressed by you to Mr. Courtney? A. Yes, sir.

Q. And that is your signature?

A. Yes, sir.

Mr. Bistline: At this time we offer this instrument as Plaintiff's Exhibit No. 2.

Judge Baum: We have no objection.

The Court: It may be admitted.

Q. In connection with this transaction did the parties remain in the bank until after banking hours that day?

A. Well, it was close to the close of our day. I

(Testimony of Oliver T. Davis.)

would not say that it was after banking hours—don't think that it was. [16]

Q. They arrived about noon?

A. Yes, about or shortly after noon.

Q. When did Mr. Courtney leave, if you recall?

A. Well, it was at the time the proceedings were all finished. That would have been probably two o'clock—yes, it would be in that neighborhood. That is a little vague, and it is a vague statement because I have no definite recollection of the time.

Q. Did Mr. Courtney leave before the other parties involved left; that is, the officers of the Fourth of July Mining Company?

A. I cannot remember in what order the parties left. However, Mr. Courtney expressed a desire to be gone and he possibly could have gone before the rest but I don't remember.

Q. Had all the business been transacted before Mr. Courtney left?

A. Other than filing the mortgage. The escrow, the mortgage, the note and the assignment had been made and signed.

Q. They were all made while Mr. Courtney was present?

A. They were signed while he was present.

Q. That had been completed? A. Yes, sir.

Q. None were signed in blank? A. No, sir.

Mr. Bistline: I think that is all. [17]

Judge Baum: I assume that in our case we can cover this same territory in a more thorough manner?

The Court: Yes, you may do that.

Judge Baum: Then there are no questions.

HOWARD M. COURTNEY

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bistline:

Q. What is your occupation?

A. I am raising cattle right now.

Q. Where do you reside, Mr. Courtney?

A. In Arkansas.

Q. Whereabouts in Arkansas?

A. Dardenelle, Arkansas.

Q. At the time of making this loan to the Fourth of July Mining Company where did you reside?

A. At Los Angeles, California.

Q. Now, what was your first connection with the mining company?

A. Some people kept insisting that I come up and look at it and invest in it, and I finally did look at it.

Q. When did you come to Idaho?

A. It must have been around July of 1947.

Q. Where did you go on that trip?

A. I went to Challis and to Sun Beam.

Q. Did you inspect the Fourth of July Mining property? [18]

A. Yes, sir.

Q. Will you tell us what mining equipment you observed at the mine?

(Testimony of Howard M. Courtney.)

A. Well, there was a mill, the customary ball mill, flotation machines, motors, crushers, and other machinery. When I went to the mine I saw a couple of cars and we visited another mine called Lucky Boy, and they had a considerable amount of rails and pipe and air-compressors that they said was a part of their equipment.

Q. Who did you make that trip with?

A. With Ed Haygood.

Q. What capacity did he hold with the mining company?

A. I don't recall at that time but he later became president.

Q. State whether or not there was equipment to operate a mine there?

Judge Baum: We object to that as immaterial.

The Court: Yes, I think it is, in fact, I don't see how the bank could be affected by this trip in any manner. That objection will be sustained.

Q. Subsequent to that trip to Idaho did members of the mining company contact you about making a loan?

A. Yes, after I was up here and I said that I was not interested, and they came down there.

Q. Down where? A. Down to Los Angeles.

Q. And did they see you? A. Yes, sir.

Q. And was there a discussion?

A. Yes. [19]

Q. What was discussed there?

Judge Baum: We object to that as incompetent, irrelevant and immaterial.

(Testimony of Howard M. Courtney.)

The Court: I cannot see how the bank could be affected by anything that took place between these parties.

Q. At that time did the matter of the bank's mortgage come up?

Judge Baum: That is objected to as being immaterial.

The Court: The Court has ruled on this matter of the conversation, this objection is also sustained.

Q. Mr. Courtney, did you go to Challis and make a loan to the mining company? A. Yes.

Q. When did you make that trip to Challis?

A. That was in September of 1947.

Q. How did you make the trip?

A. By car.

Q. Will you tell the jury just how long it took you to get there from Los Angeles?

A. Twenty-three hours.

Q. From Los Angeles? A. Yes, sir.

Q. Who was with you on that trip?

A. Paul Mills.

Q. Where is he?

A. I understand he is in Oklahoma City. [20]

Q. Who else was with you?

A. My mother.

Q. What time did you arrive in Challis?

A. About 12:00 o'clock noon.

Q. And where did you go?

A. To the bank.

Q. Who went to the bank with you?

(Testimony of Howard M. Courtney.)

A. Ed Haygood, Mr. Johnson, Mr. Bassett, Pee Wee Morton, and Paul Mills.

Q. Did you meet Mr. Davis at that time?

A. Yes, sir.

Q. Did you ever meet him before that time?

A. No, sir.

Q. For what purpose did you go to the bank?

A. I went there to secure his services to transact the business of the loan and to see that everything was there and in the mortgage.

Q. Did you talk to Mr. Davis?

A. Yes, sir.

Q. Did you secure his services?

A. Yes, sir.

Judge Baum: We object to that as a conclusion of this witness.

The Court: Yes, it is a conclusion, the conversation between him and Mr. Davis is all that would be material in any sense. [21]

Q. At the bank did you have a conversation with Mr. Davis concerning this loan? A. Yes, sir.

Q. Who was present?

A. All of those that I mentioned, there was Paul Mills, Pee Wee Morton, Mr. Haygood, Mr. Bassett, Johnson and Mr. Davis.

Q. Will you tell the jury what that conversation was that you had with respect to this loan?

A. Well, I told him that I had agreed to loan them some money if I got the right security, and I gave him the money and told him to get the security.

Q. What did you tell him?

(Testimony of Howard M. Courtney.)

A. I told him to put an exact copy of their mortgage together with the trucks, the diesel engine, and to be specific about the diesel engine and the direct driven generator that I never saw that was on his mortgage.

Q. Had you seen the mortgage held by the bank?

A. Yes, I had seen a copy.

Q. You knew what property was on the mortgage?

A. Yes, sir.

Q. Had you seen that property?

A. Yes, I had seen it except the 150 horse power diesel motor.

Q. When you gave these instructions or directions to Mr. Davis, what did Mr. Davis say to you?

A. He said "O. K., we will fix it."

Q. Did he say anything further? [22]

A. He said "We will attend to it." We asked about the pay and the mining company said they would pay for his services.

Q. As escrow holder?

A. Yes.

Q. Did he prepare the escrow agreement at that time?

A. Yes, sir.

Q. And you signed it?

A. Yes, sir.

Q. Did you deliver a check at that time?

A. Yes, sir.

Q. For how much?

A. For \$10,000.00.

Q. Was that a check or a draft?

A. A draft.

Q. To whom was that delivered?

A. To Mr. Davis.

Q. In what manner?

(Testimony of Howard M. Courtney.)

A. I handed it to him and told him, "here it is," and what to do with it. He said, "I cannot do it that way." He said that I would have to deposit it and I said, "Why?" and he said, "that is the way to do it," and I said "O.K. but I don't see why you can't deposit it when the papers are made up," and he told me to make another check to the Fourth of July Mining Company or he made it. Anyway, I signed it. I was pretty sleepy and I supposed he was responsible for all that he was doing. [23]

The Court: Mr. Witness, you will just answer the question and not make any argument at this time as to what you supposed; just answer counsel's questions.

Q. Handing you Plaintiff's Exhibit No. 3 I will ask you if that is the check that you signed, payable to the Fourth of July Mining Company?

A. Yes, sir, it is.

Q. Who made this check out?

A. I think that I did but I don't remember.

Q. To whom was this delivered?

A. To Mr. Davis.

Q. And that is the gentleman sitting here?

A. That is right.

Q. Did you give any instructions to Mr. Davis concerning this check?

A. Yes, to hold it until all these things were on the mortgage and then he was to check the record over and see that there was no liens against that, and that they owned all of these things.

(Testimony of Howard M. Courtney.)

Q. Is there anything on this check now that was not on it at the time you made it out?

A. I don't notice any.

Q. There is the bank's perforation?

A. Yes, and this statement here (indicating).

Mr. Bistline: We offer this in evidence at this time.

Judge Baum: May I ask a question? [24]

The Court: Yes, you may do that.

Judge Baum: You noticed the endorsement, "Fourth of July Mining Company by E. B. Haygood"?

A. Yes, sir, I do.

Judge Baum: Did you hand it to Mr. Davis or to a mining company officer?

A. To Mr. Davis.

Judge Baum: I have no objection to this.

The Court: It may be admitted.

Q. Now, to your best recollection how long were you in the bank that day transacting this business?

A. Possibly one hour, not over an hour.

Q. What papers were prepared, if you know, while you were present?

A. The escrow agreement was the only one that was completed. They started on the assignment of the lease; I wasn't too interested. I gave him the instructions how to handle it, and as soon as I got the escrow agreement, that was all that I was interested in and I left.

Q. You left? A. Yes, sir.

(Testimony of Howard M. Courtney.)

Q. Had the mortgage been prepared?

A. No, sir.

Q. Had the lease assignment been prepared?

A. Well, there was kind of a draft but not signed. I am sure of that; they were trying to draft it, and they had drafted [25] one that was satisfactory to me and I was not too much interested——

Judge Baum: Why don't you just answer the question, Mr. Witness.

The Court: Yes, this is not a discussion, Mr. Courtney, between you and the other parties. Just answer the questions that are asked.

Q. During the time that you were in the bank did the banker, Mr. Davis, or anyone ever submit to you a list prepared of the property to be mortgaged to you? A. No, sir, they did not.

Q. Did you know of the existence of such a list?

A. No, not any more than the list that I told them to put on it, the mortgage. I knew that there was that list, that is the only list that I ever heard about.

Q. Were you ever furnished with a copy of such list? A. No, sir.

Q. Had the mortgage been prepared as of the time you left the bank?

Judge Baum: We object to that; it has been asked and answered.

The Court: Yes, it has been answered. I believe he stated what had been prepared.

Q. If you know, had the officers of the corporation left at the time you left the bank?

(Testimony of Howard M. Courtney.)

A. Not all of them. There was a considerable number in and out. I went out with Paul and we got in the car and left.

Q. Did you return to the bank that day? [26]

A. I never saw the bank again for over a year.

Q. Now, Mr. Courtney, did you ever receive a copy of the mortgage, or the mortgage itself?

A. I received a copy.

Q. When did you get that copy?

A. Along about August, 1948.

Q. Where did you get that copy?

A. At the Bank.

Q. From whom did you get that copy?

A. Mr. Davis.

Q. Where was that?

A. That was at the Challis bank.

Q. Handing you what has been marked as Plaintiff's Exhibit No. 4, I will ask you if that is the copy which you received from Mr. Davis?

A. Yes, it seems to be the copy I received that day.

Judge Baum: Where is the rest of this?

A. That is all of it.

Judge Baum: Did you notice that the seal was partially on this rider—do you mean that you didn't get the additional part of this rider?

A. No, sir, that is all there was.

Judge Baum: We have no objection to this.

The Court: Are you offering it, Mr. Bistline?

Mr. Bistline: We do offer it, yes, sir.

(Testimony of Howard M. Courtney.)

The Court: Then it may be admitted. [27]

Q. Did you have Mr. Davis certify this as being a true copy?

Judge Baum: It shows—it speaks for itself, and we object to this question.

The Court: The objection is sustained, the exhibit is admitted and it does speak for itself.

Q. Do you recall when in August it was that you obtained this copy of the mortgage?

A. No, I don't remember the exact date.

Q. At the time you received this from Mr. Davis, did you discuss the mortgage with him?

A. Yes, I asked why the stuff wasn't on there that was supposed to be there.

Q. Where did that take place?

A. That was in August.

Q. Where? A. At the Challis Bank.

Q. And who was present?

A. Mr. Davis and myself.

Q. And what happened at that time?

A. Well, I asked for a copy and he said that I couldn't have it, that it was held in escrow, and I asked for a copy, and he very reluctantly gave it to me. I saw that I didn't have the property on it and I asked what about it.

Q. What property wasn't on it?

A. The ball mill, the flotation machine, the two rock crushers, and the 150 horse power diesel with the direct driven generator. [28]

Q. And what did Mr. Davis say about those items?

(Testimony of Howard M. Courtney.)

A. Well, he said they must have given him a different list.

Q. And what did you say?

A. Well, I said, "We will see what is the matter, that is not the way that it is supposed to be."

Q. Was anything further said that day?

A. No, I didn't feel like talking very much to him.

Q. Now, tell the jury what items are not on this mortgage that you believed would be mortgaged to you?

A. Two crushers, a large ore crusher and a fine ore crusher, the ball mill, and a three-cell flotation machine and a single-cell flotation machine and 150 horse power diesel with a direct driven generator, an army truck—I don't know too much about the brands——

The Court: Just answer the question and don't volunteer any information as to what you might understand.

A. This army truck and a welding machine is what I recall now as being off the mortgage that should be on it.

Q. Had you seen any of this property at the mine?

Judge Baum: The question has been answered, and we object to it as repetition. I believe he did describe what he saw at the time.

The Court: Yes, I don't think it would be material here anyway.

Q. Did Mr. Davis, at the time you obtained a

(Testimony of Howard M. Courtney.)

copy of this mortgage, [29] tell you why those items were not on your mortgage?

A. He said that they must have given him a different list.

Q. And did he give any further explanation?

A. No, that is all.

Q. You have examined these items that were not on the mortgage. Can you give the jury the valuation that you placed upon those items?

Judge Baum: We object to that as incompetent, irrelevant and immaterial, and no proper foundation has been laid.

The Court: The objection is sustained.

Q. Are you familiar with the property, this property, and had you had any experience in dealing with mining property?

A. With similar property I have, yes.

Q. And where was that experience had?

A. In Los Angeles.

Q. In connection with what type of business?

A. With phonograph record manufacturing.

Q. Did you deal in this kind of machinery, this kind of material?

A. Hydraulic compressors, electric motors, and lathes, and such things.

Q. Did you acquire a knowledge as to the values of this type of material?

A. Yes. I built a record factory and I used machinery to build it and after it was completed and I got acquainted with [30] several different machinery houses and I went to two or three sales—

(Testimony of Howard M. Courtney.)

auction sales—and I got some small amount of knowledge of the value of all kinds of machinery.

Q. From that experience can you give us the valuation of this property that you had seen which was not on the mortgage?

Judge Baum: That is objected to as incompetent, irrelevant and immaterial, and no proper foundation has been laid, no time has been set, and the witness is not shown to be qualified.

The Court: I think at this time we will recess until 2:00 o'clock.

May 18, 1951—2:00 o'Clock P.M.

The Court: The objection will have to be sustained to the question which was asked just before the recess.

Mr. Bistline: May I ask the Court upon what ground so that I may attempt to ask it again?

The Court: He is not qualified.

Q. Mr. Courtney, calling your attention again to the day you were at the bank and the arrangement was made for the loan to the mining company, state whether or not at that time you asked him to write down your instructions concerning the loan?

A. I did.

Q. And what did he say? [31]

A. He said: "That is not necessary, we do business different in Idaho to what they do in other places, it is not necessary."

Q. Was there any other or further conversation concerning those instructions?

(Testimony of Howard M. Courtney.)

A. I repeated them at least two or three times. I asked if he was bonded to take care of the different things and when I went out of the door I asked him again if he understood what I wanted and I told him again.

Q. Now in regard to your question as to whether he was bonded, was that to take care of the business?

A. Yes, sir.

Q. As an escrow holder?

Judge Baum: We object to that as leading.

The Court: Perhaps it is, but he may answer.

A. Yes, sir.

Q. Have you had any other experience in dealing with or handling or in regard to such equipment and machinery and items similar to these in regard to their value?

A. I was a steel car builder for the railroad for a good many years, and I built different kinds of farm machinery, and also this record factory, completely built out of this junk. I know how it is constructed and what it costs to construct it, yes, sir.

Q. Did you examine this machinery?

A. Yes.

Q. And the location where it was?

A. Yes, sir. [32]

Mr. Bistline: Now may we renew our offer to have this man testify as to the values?

Judge Baum: And we will renew our objection.

The Court: I must sustain the objection.

Q. At the time you made this loan you were familiar with the machinery at the time?

(Testimony of Howard M. Courtney.)

A. Yes, sir.

Q. You dealt in machinery? A. Yes, sir.

Q. Are you familiar with the market value of that machinery, or similar machinery at that time?

A. Yes, I was.

Q. From your experience in handling such machinery you became familiar with its value?

A. Yes, sir.

Mr. Bistline: Now may we renew our offer to prove the value?

Judge Baum: And we again renew our objection.

The Court: Sustained.

Q. Mr. Courtney, in the year 1949, in the spring of that year, did you go to the mine at Challis?

A. Yes, sir.

Q. About when did you get there?

A. May, I think, or it could have been June.

Q. With whom did you go?

A. L. B. Johns. [33]

Q. At that time did you go to the mining property? A. Yes.

Q. Did you make an inspection of the property that was present at that time? A. Yes, sir.

Q. Will you tell the jury what property you had upon your mortgage that was at the mining company property at that time?

Judge Baum: Now we shall object to this as entirely immaterial.

The Court: Yes, it is immaterial, he has told

(Testimony of Howard M. Courtney.)

you that he listed the machinery that he inspected at the mine.

Mr. Bistline: But this is in 1949.

The Court: After all this transaction was over?

Mr. Bistline: Yes, sir.

The Court: Then the objection is sustained to that, it would not be material here.

Mr. Bistline: I think that is all. You may cross-examine. [34]

Cross-Examination

By Judge Baum:

Q. You are living where now?

A. Dardenelle, Arkansas.

Q. How old are you? A. Forty-eight.

Q. When did you leave California?

A. About two years ago, that is approximately.

Q. The first time that you met Mr. Davis was when?

A. The day we went in to fix the papers, that was the 23rd of September, 1947.

Q. You had never been in that bank before?

A. No.

Q. Who went into the bank with you?

A. Several, Mr. Haygood, Mr. Bassett, Johnson, and Morton.

Q. Anybody else? A. Yes, Paul Mills.

Q. Did Mr. Morton go to the bank?

A. Yes.

Q. And did Mr. Mills? A. Yes, sir.

(Testimony of Howard M. Courtney.)

Q. Did they stay while the negotiations were going on?

A. Yes, they were in and out; they were there a part of the time.

Q. Both of them, both Mr. Mills and Mr. Morton, while you were negotiating?

A. Yes, I was facing Mr. Davis and they were back of me, milling back and forth. [35]

Q. Who introduced you to Mr. Davis?

A. Mr. Johnson or Mr. Haygood; they seemed to be running the show.

Q. You saw a list of the property that day?

A. No, sir.

Q. Can you list the property that you,—let me withdraw that,—what was the first thing said when you went into the bank?

A. Well, we were introduced.

Q. And what was the next thing that occurred?

A. Well, I presume that Mr. Johnson or Mr. Haygood said: "This is the man that is supposed to advance us the money" and we started the conversation.

Q. And then who spoke up?

A. Well, he probably asked what we wanted or what he could do for us.

Q. Did he ask you what you wanted?

A. Yes, sir.

Q. And who answered that question?

A. I did.

Q. Mr. Johnson and Haygood didn't say anything?

(Testimony of Howard M. Courtney.)

A. No, not then, I was doing the talking. I was talking to him at that time.

Q. And what did you say?

A. I told him what I wanted.

Q. You told him what you wanted?

A. Yes, sir, I wanted a list of the stuff just like the bank's mortgage was on all of their [36] property.

Q. On what property?

A. On the mill and mine property, on the truck, and the welder.

Q. And what other property?

A. The mill buildings, the assignment of the lease, the welder, and the truck, on all of the property the bank had.

Q. What was said about the assignment of the lease?

A. They didn't know how to write it; they were going to get an attorney.

Q. Who drafted that? A. Mr. Johnson.

Q. Mr. Davis didn't have anything to do with that? A. Well, he assisted.

Q. Did Mr. Davis say anything to you that day concerning the fact that he wasn't an attorney and that you should get an attorney for that?

A. Yes, he did.

Q. Isn't it a fact that was drawn up the street somewhere?

A. It was drafted, that is all I know about it.

Q. Who drafted it?

A. Mr. Davis or Mr. Johnson.

(Testimony of Howard M. Courtney.)

Q. Mr. Davis assisted in drafting it?

A. The rough draft with a pencil.

Q. That was after he told you to get an attorney?
A. Yes, sir.

Q. When did you see the bank's mortgage?

A. I saw a copy in Los Angeles.

Q. You saw a copy in Los Angeles? [37]

A. Yes, sir.

Q. When was that?

A. That was about two months before I advanced the loan.

Q. Mr. Davis didn't show you the mortgage?

A. No, sir.

Q. You didn't go to the records, the county records, to see it?
A. No, sir.

Q. Do you know if the original was like the copy?

A. You say do I know whether the machinery was like the copy?

A. No, I asked do you know whether the copy was like the original mortgage?

A. It was the same as the machinery there.

Q. How do you know?

A. Because I checked it against the machinery.

Q. You didn't check the copy that you saw against the original in the recorder's office?

A. No, sir.

Q. Do you know that Mr. Bassett had a mortgage on a part of the Fourth of July Mining Company equipment?
A. Yes, sir, I do.

Q. Did you ever see that mortgage?

(Testimony of Howard M. Courtney.)

A. No.

Q. Do you know the amount?

A. It was around a thousand dollars.

Q. You knew that Mr. Bassett had a mortgage on this truck and welder when you were in the bank that day?

A. Yes, sir. [38]

Q. You say that you gave him the directions how to draw the mortgage?

A. Yes, sir.

Q. You asked him to put the directions in writing?

A. Yes.

Q. And what did he say?

A. He said that it wasn't necessary, he said: "He said we don't do business that way."

Q. And did you repeat it again?

A. Yes.

Q. And what did he say?

A. He said, "We don't do business that way."

Q. That was when you asked him to put it in writing?

A. Yes, sir.

Q. You repeated the directions?

A. Yes, I repeated what were the directions and I asked him if he understood it.

Q. How many times did you repeat the instructions of what to put in the mortgage?

A. Three or four times.

Q. Was that including the time when you said you were going out of the door?

A. Yes, sir.

Q. You told him all this property that you wanted in this mortgage?

A. Yes, sir. [39]

Q. You say that you repeated it four times?

A. At least.

Q. Will you repeat it to me again?

(Testimony of Howard M. Courtney.)

A. That I wanted exactly,—

Q. Repeat to me what you said to him.

A. I want exactly what is on your mortgage, what you hold, I want what is on the mortgage that you hold.

Q. You didn't list the property?

A. No, sir.

Q. You didn't tell him that you wanted this item or that item?

A. I wanted him to copy his list.

Q. From the time that you went out of the door there at the bank, how long was it before you were back in?

A. One year.

Q. Didn't you come back that day?

A. No, sir.

Q. You stayed in there all of this time?

A. Nearly an hour.

Q. And as you went out you were still telling him what you wanted in the mortgage?

A. To be sure to get it right.

Q. And was the mortgage signed at that time?

A. It was not.

Q. The escrow was signed?

A. Yes, sir.

Q. The mortgage was not signed in your favor?

A. No, sir. [40]

Q. From the time you got in there until you left, the only thing that was done was you handing the check over and the drawing of the escrow papers?

A. And the drafting of the lease assignment, that took considerable time.

Q. That was prepared?

A. Yes.

(Testimony of Howard M. Courtney.)

Q. Was it signed?

A. No, it wasn't even drawn, it was just drafted.

Q. What is the difference?

A. Well, drafting is just a rough sketch, but the drawing is the finished copy.

Q. Who did the drafting of this?

A. Mr. Johnson or Mr. Davis or both.

Q. And who did the drawing?

A. It wasn't drawn.

Q. From the time you went into the bank until you left you had not been out at all? A. No.

Q. The only signature that you saw was your signature on this bank draft?

A. That is right.

Q. Did you see the check that was made out by you to the Fourth of July Mining Company?

A. I guess so, I made it out.

Q. It was all completed? A. Yes, sir. [41]

Q. And did you see the check from the Fourth of July Mining Company to the bank?

A. No, I didn't.

Q. The escrow papers were prepared?

A. Yes, sir.

Q. And you took your copy that day?

A. Yes, sir.

Q. And it had a list on there of what was to be in escrow?

A. Well, I attempted to get him to write it down.

Q. You accepted the escrow papers in the form that it now is? A. Yes, sir.

Q. When he handed it to you did you object?

(Testimony of Howard M. Courtney.)

A. No, I had already made my objection, but——

Q. But you accepted it in the form that he handed it to you? A. Yes, sir.

Q. And you left with it?

A. Yes, sir, that is right.

Q. Were not the papers mentioned in the escrow put in that file?

A. The papers that were mentioned were put in, yes.

Q. All of the papers mentioned in this escrow agreement were put in the file? A. Yes, sir.

Q. And the next summer, I believe you say, you saw it? A. Saw what?

Q. Saw the bank file, this escrow file?

A. No, sir. [42]

Q. When you were in the bank in 1948, didn't you see it? A. I did not.

Q. That was the time he gave you a copy of the mortgage?

A. I never saw the original at that time.

Q. What did you understand was in the bank mortgage that you did not see in your mortgage?

A. Well, there was the large ore crusher, the fine ore crusher, the ball mill, the three-cell flotation, and the single cell flotation.

Q. And that is all? A. Yes.

Q. Is that property that was,—who claimed that if you know? A. I don't know.

Q. You didn't know who claimed that property?

A. No, sir.

(Testimony of Howard M. Courtney.)

Q. Did you understand that it was owned by the Fourth of July Mining Company? A. I did.

Q. And that there was no claim on it?

A. There was a claim or claims against it.

Q. Who did you understand was claiming it?

A. I understood that there was a claim of a mortgage against it.

Q. And who held that mortgage?

A. The Custer County Bank.

Q. Who else?

A. I didn't know of anyone else holding a mortgage on this particular property. [43]

Q. That is the property that you have just referred to? A. That is right.

Q. And when did you become aware that the mortgage in your name did not cover all of the property mentioned in the bank's mortgage?

A. That was in August of 1948.

Q. That is the first time that you knew that there was a difference in the property described in the two mortgages? A. Yes, sir.

Q. Where did you get that information?

A. From Mr. Davis.

Q. Did he say anything about that?

A. Well, under pressure he gave me a copy.

Q. Did he tell you that day about your mortgage not having all of the property described, that was described in the bank mortgage, in your mortgage?

A. I don't quite understand, but I got the information from him in the copy.

Q. Did he tell you anything that day?

(Testimony of Howard M. Courtney.)

A. He told me that the lists must have gotten mixed.

Q. How do you know that your mortgage didn't cover all of the property mentioned in the bank's mortgage?
A. I could see.

Q. After looking at the mortgage you knew that there was a difference?
A. Yes, sir. [44]

Q. And what is the difference?

A. The difference between the two is that in this one you don't have the large ore crusher.

Q. And what else?

A. The fine ore crusher.

Q. And what else?
A. The ball mill.

Q. Anything else?

A. Yes, the single cell flotation and the three-cell flotation.

Q. Yes?

A. And the 150 horse power diesel motor with the direct driven generator.

Q. And what else?

A. That is all that I recall right now.

Q. What did you compare this mortgage that he gave you a copy of with so that you would know that it didn't have some of the property that the bank mortgage had?
A. When?

Q. At the time you say you compared this, what did you compare the copy of the mortgage that Mr. Davis gave you was so that you knew that the bank had other items than you had in your mortgage?

A. I remembered the machinery.

Q. You remembered over a year and a half or a

(Testimony of Howard M. Courtney.)

year and two months what was supposed to be in the mortgage? A. Certainly. [45]

Q. And it was when you saw this mortgage that you discovered it? A. Yes, certainly.

Q. And that is the first time that you knew you had a mortgage that didn't have all of the property that you thought was supposed to be in there?

A. Yes, sir.

Q. What was said the first day that you were in the bank, what else,—you have told us about the directions that you gave, what else was said?

A. That is it.

Q. That is all?

A. That is all that I said to him.

Q. When did you ask him about being the escrow agent? A. During the day.

Q. Then you did have some other conversation besides the directions?

A. Well, I gave the directions over and over.

Q. And when did he say that he was bonded as an escrow agent?

A. During the conversation.

Q. What did you ask him and what did you say?

A. I asked if he was bonded and could take care of this, and he said: "Yes."

Q. Did you pay him any money for this work?

A. No, sir, I asked him,—

Q. You didn't pay him? A. No. [46]

Q. Didn't he tell you that he didn't take any money for drawing a mortgage? A. Yes, sir.

(Testimony of Howard M. Courtney.)

Q. Did you pay the escrow fee? A. \$17.00.

Q. Who paid that fee?

A. So far as I knew the Mining Company. I don't even know that it has been paid.

Q. Mr. Haygood is a relative of yours, is he not?

A. Yes, sir, he is.

Q. When did you first know about Mr. Reamsnyder and Becker?

A. I guess the first time that I went to the mine, I thought that it was Reamsnyder and his son, but it was Reamsnyder and Becker.

Q. Do you know what property they were claiming?

A. I don't know that they were claiming any.

Q. When did you find out that they were claiming property that the Fourth of July Mining Company had an interest in?

A. That was about August, 1949.

Q. The first time that you knew that Reamsnyder and Becker were claiming any of the Fourth of July Mining Company property was in August or September of 1949?

A. Yes, that is, other than shares in the company.

Q. Then you were advised that they were claiming what?

A. The equipment left off my mortgage. [47]

Q. And that is the equipment you have described that was left off this mortgage? A. Yes, sir.

Q. You were never advised of that until you

(Testimony of Howard M. Courtney.)

made your trip to Idaho in August or September of 1947?

A. I think it was in August, it was in July, August or September, and I think it was in August.

Q. And that is the first time you were informed?

A. Yes, sir.

Judge Baum: Have you the original letters that I asked you to produce, Mr. Bistline?

Mr. Bistline: I have one of them.

Q. I note, Mr. Courtney, on the escrow agreement that you were to get some shares of stock in the Fourth of July Mining Company, was that right? A. No.

Judge Baum: May I see that escrow agreement?

(Exhibit handed to counsel.)

Q. You had a choice to take money or stock?

A. Yes, sir.

Q. You could ask for \$6,000.00 or 15,000 shares of stock? A. That is right.

Q. You later became a shareholder in the mine?

A. That is right, I did.

Q. Along in March your note became due?

A. Yes, probably about that date. [48]

Q. After that you took some stock?

A. Yes, sir.

Q. And you granted an extension to them on their note? A. Yes, sir.

Q. I hand you what has been marked for identification as exhibit No. 5, being a letter. Did you sign that? A. Yes, sir.

(Testimony of Howard M. Courtney.)

Q. Do you know Mr. Haygood's signature?

A. I am not too familiar with it.

Q. Do you know Mr. Howard E. Johnson's signature?
A. No, I don't.

Q. That exhibit is in the same condition as when you saw it?

A. Yes, it seems to be. I don't know what this mark is (indicating).

Judge Baum: We will explain that later. We offer now Defendants' Exhibit No. 5.

The Court: I think that will be admitted.

Q. You received, did you not, when you were in the bank in July or August, 1948, some shares of stock in this mining company?

A. Yes, I did, it was in July, I think, and I think it was in 1949.

Q. Wasn't that in 1948?

A. Yes, at the time I picked up the copy of the mortgage.

Q. Then whatever time you got the copy of the mortgage you received two certificates of stock in the amount of 2,000 shares each?

A. Yes, I don't remember the amount, but I did get the certificates. [49]

Q. And that was a part of the consideration for the extension of your note for an additional year?

A. Yes, but it was eleven months, not a year.

Q. Do you recall receiving that letter which has been handed to you, and which was marked as Defendants' Exhibit No. 6?

A. Yes, I remember getting that.

(Testimony of Howard M. Courtney.)

Judge Baum: We move the admission of that as Defendants' Exhibit No. 6.

Mr. Bistline: We have no objection to that.

The Court: It may be admitted.

Q. As I recall you say the only thing that was signed when you left the bank was the cashier's check, your check and the escrow agreement?

A. That is right.

Q. This assignment of lease was not signed?

A. No.

Q. And the minutes were not there?

A. No.

Q. The only paper that you signed was this draft or these checks and the escrow agreement?

A. That is right.

Q. Is that your signature thereon (indicating)?

A. It seems that I did,—yes, I remember, O.K.

The Court: All he asked you, Mr. Witness, was, is that your signature?

A. Yes, that is my signature. [50]

Q. And you signed that on the 23rd of September, 1947?

A. That is the only time I was there.

Q. You signed it when you were in the Custer County Bank at the time you were there on the 23rd of September, 1947?

A. I approved it, I don't remember signing, but I must have at that time.

Judge Baum: We move the admission of this as Defendants' Exhibit No. 7.

Mr. Bistline: We have no objection.

(Testimony of Howard M. Courtney.)

The Court: It may be admitted.

Q. You have a copy of the original of the letter that I demanded from your counsel, do you remember receiving the original of that from Mr. Davis or the Custer County Bank?

A. Yes, sir, I do.

Q. Do you know where the original is?

A. No, I don't.

Judge Baum: We move the admission of No. 8, that is this instrument I hold here.

Mr. Bistline: No objection.

The Court: It may be admitted.

Q. Mr. Courtney, do you recall receiving a copy of the letter that I hand you, it is now marked as exhibit No. 9,—do you recall receiving the original of that? A. Yes, I do.

Judge Baum: We move its admission at this time as exhibit No. 9. [51]

Mr. Bistline: We object to this as immaterial and incompetent, the original has been admitted.

Judge Baum: If it is admitted then we don't want to offer the copy. I will withdraw this offer.

The Court: It may be withdrawn.

Q. I hand you what has been taken from the file, the original escrow, does that bear your signature?

A. Yes, sir.

Q. Was it in that form when you signed it?

A. Yes, it was.

Mr. Bistline: If that is offered, I have no objection. It is the original of another exhibit which is in the record.

(Testimony of Howard M. Courtney.)

The Court: It is the original with the signatures, and it may be admitted.

Q. Did you on September 23, 1947, ask for a copy of the mortgage?

A. Yes, copy of the bank's mortgage.

Q. You asked for a copy of the bank's mortgage? A. Yes, sir.

Q. What did he tell you?

A. That he didn't have it available.

Q. Was that after you had given the instructions as to the new mortgage? A. Yes, sir.

Q. You asked for a copy of the bank's mortgage? A. Yes, sir. [52]

Q. And he said that he didn't have it available?

A. That is right.

Q. You didn't ask for a copy of your mortgage?

A. No.

Q. You didn't go to the county recorder's office?

A. No, sir.

Q. Is there only one firm of Reamsnyder and Becker in that county?

A. That is all I ever heard of.

Judge Baum: I think that is all.

Redirect Examination

By Mr. Bistline:

Q. At the time that you granted the extension on the mortgage as reflected by this exhibit, did you know of the omission of the property on your mortgage? A. No, sir.

(Testimony of Howard M. Courtney.)

Q. Do you recall when that extension was granted?

A. Yes, probably in March of 1948.

Q. Mr. Courtney, if you had known of the omission of this property from your mortgage, would you have granted the extension? A. No, sir.

Q. If you had known at the time you made the original loan to the Company, on the day that the loan was made, that the Company had mortgaged property to the bank which it did not own, would you have made the loan?

A. No, I would not. [53]

Q. When did you receive the stock certificates that were turned over to you as consideration for the extension?

A. I picked up the copy of the mortgage at the same time,—I don't remember the date.

Q. Counsel asked if Mr. Haygood was a relative of yours? A. Yes, sir, he is.

Q. What is that relationship?

A. He is a grandson of my father's half brother.

Q. How often have you seen him?

A. I never saw him until we were both past forty,—I know that I was past forty anyway before I even saw him.

Q. Handing you what has been admitted as Defendants' Exhibit No. 6, I will ask you under what circumstances you signed that?

Judge Baum: We object to that, under what circumstances would be immaterial. He said that he signed it in the bank.

(Testimony of Howard M. Courtney.)

The Court: Yes, he has testified to that.

Q. I will ask you if you know the purpose for which that was signed?

Judge Baum: We object to that as immaterial.

The Court: It is in the agreement itself, but he may answer.

A. What do you want to know?

Q. Do you know for what purpose that was signed by you?

A. No, I don't,—I don't see any reason for it. [54]

Q. I will ask you if you know if that is a part of the property that you requested in your assignment of leased claims? A. Yes, sir, it is.

Q. Had you signed any other papers in the bank that day besides this and the escrow agreement?

A. That is all, I am positive that is all.

Q. Do you know who requested you to sign this?

Judge Baum: That is objected to as immaterial.

The Court: He may answer.

A. I requested it to be drawn.

Q. Do you know who drew it?

A. Mr. Johnson and Mr. Davis drew it but from there on I don't remember. I approved it but I don't remember signing it, but that is my signature. The best I recall is that I do remember approving the rough draft of it verbally.

Q. Were you to receive the assignment of the lease as a part of your security that day?

A. Yes, sir.

(Testimony of Howard M. Courtney.)

Q. What was the connection of that with this lease, is that an assignment of the lease?

A. It appears to me to be.

Q. Do you have any interest in the property assigned by that agreement?

The Court: Isn't that the best evidence,—he may answer, go ahead.

A. It doesn't have any signature except [55] mine.

Mr. Bistline: I think that is all.

A. I wasn't given any other.

Mr. Bistline: You may cross-examine, Judge Baum.

Recross-Examination

By Judge Baum:

Q. When you talked about drafting and drawing an instrument,—is that the one?

A. Yes, sir.

Q. That is the only instrument you had in mind when you talked about drafting and drawing an instrument?

A. No.

Q. What did you have in mind?

A. That was not what I had in mind. This seems to be an assignment from Reamsnyder and Becker.

Q. That is the assignment of lease, isn't it?

A. This is the lease.

Q. You signed it that day?

A. I don't know. I don't remember ever seeing this before. I thought it was something else. I

(Testimony of Howard M. Courtney.)

looked at it about ten minutes before I understood what it was,—this is between Reamsnyder and Becker and me.

The Court: I think you have answered the question.

Q. Is that the one that you referred to when you were talking about the drafting and drawing of an instrument? A. No, sir. [56]

Q. Which one was it you talked about when you referred to going to an attorney?

A. That was another.

Q. I will ask you if the instrument that you now have was the one that you were referring to, if you know? A. I wouldn't say that it was.

Q. You don't think that it was?

A. No, the one that was drafted that day,—it doesn't seem the same as the one that was drafted.

Q. Will you look at proposed exhibit No. 11 and I will ask you if you ever saw that list, that paper?

A. No, sir.

Q. Was not a list similar to that list—a list like that handed around at the time this mortgage was drafted? A. It wasn't handed to me.

Q. In the bank you were seated around a desk?

A. Most of them were standing.

Q. They were close together?

A. They were back around the desk.

Q. Did you see them with a list?

A. No, sir.

Q. Did you hear any of them say: "Here is the list to be included in the mortgage"?

(Testimony of Howard M. Courtney.)

A. No, sir.

Q. Would you say that you didn't see that list?

A. No, I didn't. [57]

Q. Or a similar piece of paper?

A. No, sir, I didn't.

Judge Baum: That is all.

Redirect Examination

By Mr. Bistline:

Q. Mr. Courtney, part of the security that you requested was the assignment of the lease of the mining claims? A. Yes, it was.

Q. Do you know if this instrument was executed in connection with that assignment?

Judge Baum: He said that he didn't know the purpose of this.

The Court: I think that is right. Of course, if he has changed his mind on that he may answer.

A. No, I don't understand this.

Q. You will observe the recital concerning the consideration of \$10,000.00? A. Yes.

Q. Do you know who was to pay that or how it was to be paid?

The Court: I think, Mr. Bistline, that he has said he didn't know anything about that, but maybe he does now, he may answer.

A. I don't know.

Mr. Bistline: I have nothing further.

Judge Baum: That is all.

The Court: At this time we will take a short recess. [58]

(Testimony of Howard M. Courtney.)

3:00 o'Clock P.M.—May 18, 1951

Mr. Bistline: I would like to ask another question or two if I may.

The Court: You may do so.

Redirect Examination

By Mr. Bistline:

Q. Mr. Courtney, during the recess did you have an opportunity to look at the assignment or agreement and also Exhibit No. 7 as it is marked now, the same exhibit? A. Yes, sir.

Q. Having stated that, and having looked at it, do you recall that now? A. Yes, sir, I do.

Q. Will you tell the jury just what that recalls to you? A. Yes, sir.

Judge Baum: We object to that on the ground that the instrument is in writing.

Mr. Bistline: May I ask another question?

Q. I will ask you why that was signed and included in the escrow at that time?

The Court: I think it was testified to that it was a part of the escrow, that assignment was a part of the escrow.

Judge Baum: We object to it as it speaks for itself. [59]

The Court: He may answer, but I think he has testified to it. You may go ahead.

A. That was an assignment that was to go back after they paid the mortgage to me, and not being

(Testimony of Howard M. Courtney.)

interested that far ahead,—you see I was sleepy and tired, and I didn't pay too much attention, I remember now.

The Court: You have answered the question.

EDWARD B. HAYGOOD

called as a witness, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Bistline:

Q. Where do you reside?

A. Del Monte, California.

Q. How long have you resided there?

A. A little over two years this last time.

Q. Are you a relative of Mr. Courtney's, the party who just testified? A. A distant cousin.

Q. Were you at one time interested in the Fourth of July Mining Company?

A. I was in the Fourth of July Company, yes.

Q. Did you hold any office?

A. As President, yes, sir.

Q. When were you President of the [60] Company?

A. The exact dates I don't know, and I don't know what time it was, but it was during about the time of this trial,—I was President during the time of this deal taking place. I was President then. I would say that I was there a year or a year and a half.

(Testimony of Edward B. Haygood.)

Q. Are you familiar with the property mortgages to the Custer County Bank prior to the Courtney loan?

A. What was there, I was, yes, sir.

Q. Are you familiar with the property on that mortgage to the bank? A. Yes, sir.

Q. Will you state what the facts is as to the property being on that mortgage that did not belong to the mining company?

Judge Baum: That is objected to as immaterial.

The Court: The objection is sustained.

Q. Prior to the making of the Courtney loan had you met with the bank officials concerning the mortgage that they held? A. I had, yes.

Q. Where did you meet,—I mean when did you meet with the bank? A. On several occasions.

Q. With whom did you meet?

A. With Mr. Davis.

Q. Will you tell the court and jury what the purpose of the meeting with Mr. Davis was?

Judge Baum: Objected to as immaterial.

The Court: We are not interested here in a mortgage between Mr. Davis and the Company, or Mr. Haygood [61] and the bank, or any difficulty they may have had with any other mortgage. The only mortgage in question here is the Courtney mortgage.

Q. Mr. Haygood, do you recall September 23, 1947? A. Yes, sir.

Q. Do you recall Mr. Courtney coming to Challis on that day? A. Yes, sir.

(Testimony of Edward B. Haygood.)

Q. What time did he arrive there?

A. Sometime around noon.

Q. Where did he come from, if you know?

A. From Los Angeles.

Q. How did he travel? A. By automobile.

Q. Did you meet with Mr. Courtney at that time?

A. Yes, he was at the bank when we arrived.

Q. Which bank?

A. The Custer County Bank of Challis.

Q. Who went to the bank?

A. Mr. Courtney, myself, Howard Johnson, Mr. Bassett, Mr. Morton, and Mr. Mills.

Q. What was the purpose of that meeting?

A. To get a loan of \$10,000.00 from Mr. Courtney to pay off certain obligations and mortgage that we had with the Custer County Bank.

Q. After you met him you went into the bank, did you? A. That is correct. [62]

Q. And what took place inside of the bank?

A. Well, naturally, there were introductions and some discussions before we actually got down to the business at hand. When we did get down to the business Mr. Courtney asked Mr. Davis if he would act as his agent,—not as his agent, but to take care of certain obligations.

The Court: Will you just use the words that were spoken between Mr. Davis and Mr. Courtney,—that is what we want, the conversation.

A. Mr. Courtney asked Mr. Davis if he would handle these problems on this mortgage and the

(Testimony of Edward B. Haygood.)

escrow, if he would handle the escrow, and Mr. Davis told him that he would, and Mr. Courtney told him what he wanted. He told him what the stipulation was.

The Court: Can't you just state the conversation?

A. As far as the conversation is concerned,—Mr. Courtney told Mr. Davis that he wanted everything that the Fourth of July Company had, the mill, mining machinery, and other machinery, the mining and milling machinery, and any kind of machinery that would be accumulated in the future until his note was paid off.

Q. What did Mr. Davis say?

A. Mr. Davis agreed to handle the agreements and everything.

The Court: I don't want to continually interfere, but can't you just state what he said,—not what your conclusion was, but give the actual [63] words.

A. Well, the actual words,—it come down to the same thing.

The Court: Now, Mr. Witness, you just answer the question and not just say that it will come down to the same thing. The jury is here to interpret your testimony as to whether it comes down to the same thing.

A. Mr. Davis told him that he would handle it.

Q. And what was done next?

A. Well, there was an escrow agreement drawn up.

(Testimony of Edward B. Haygood.)

Q. Who drew the escrow agreement?

A. Well, there was certain stuff that they put in.

Q. Who drew it?

A. Mr. Davis, but Mr. Courtney put in what he wanted in it.

Q. Did Mr. Courtney deliver any money at that time?

A. Yes, he deposited a check, a personal checking account in the Custer County Bank.

Q. Do you know for how much?

A. \$10,000.00.

The Court: There is no question but that Mr. Courtney deposited a draft for \$10,000.00 and issued his check to the mining company for \$10,000.00, so I cannot see any reason for any dispute on that.

Q. Will you examine this check,—is that your endorsement on the back of it? A. Yes, sir.

Q. From whom did you receive that check?

A. From Mr. Davis. [64]

Q. Do you know to whom Mr. Courtney delivered that check? A. To Mr. Davis.

Q. When did you receive that check from Davis?

A. At the completion of the contracts for all the mine and machinery.

Q. How long was Mr. Courtney at the bank that day?

A. I would say an hour or maybe a little more.

Q. During the time that Mr. Courtney was at the bank had the mortgage been prepared?

(Testimony of Edward B. Haygood.)

A. No.

Q. Had the assignment of the claims been prepared? A. I believe it had.

Q. And had the extract from the minutes of the mining company been furnished? A. No.

Q. When were they furnished?

A. About two days later.

Q. Were you present at the time the mortgage was prepared? A. Yes, sir.

Q. Who prepared the mortgage?

A. Well, Mr. Johnson and Mr. Davis did most of the writing up to then.

Q. You were an officer of the company at that time? A. Yes, sir.

Q. Do you know what property of the company was included in the mortgage? [65]

A. The mortgage that was signed?

Q. Yes. A. Yes, sir.

Q. Was there a list of that property belonging to the mining company? A. Yes, sir.

Q. Was that prepared from that list?

A. Yes, sir.

Q. Do you know if that list was ever submitted to Mr. Courtney? A. Not to my knowledge.

Q. Are you familiar with the property that was mortgaged to Mr. Courtney? A. Yes, sir.

Q. Are you familiar with the mining property?

A. Somewhat.

Q. Are you familiar with the claims of the mining company? A. Yes, sir.

(Testimony of Edward B. Haygood.)

Q. Are you familiar with the mining property that the corporation owned at that time?

A. Yes, I think so.

Q. With respect to the properties that were mortgaged by the mining company to Mr. Courtney, can you give us the value of the items mortgaged to Mr. Courtney,—let me ask you this, are you familiar with the value of that property?

A. Yes. [66]

Q. Now, can you give us the values of the property that was mortgaged?

A. Possibly some of the items.

Q. Can you give us the valuation of the Chicago compressor? A. Yes, sir.

Q. What was that?

Judge Baum: We object to that on the ground that no foundation is laid and no time or place is fixed.

Mr. Bistline: This is the President of the corporation,—I will ask another question.

Q. I want you to fix the valuation as of September 23, 1947; with that time fixed and the location of the property, what was the value of the Chicago compressor? A. \$300.00.

Q. And what was the value of 500 feet of air hose?

Judge Baum: We object to that as no proper foundation is laid.

The Court: The objection is sustained.

Q. Are you familiar with the 500 feet air hose that the mining company owned? A. Yes, sir.

(Testimony of Edward B. Haygood.)

Q. Do you know the value of it?

A. \$100.00.

Q. My question was do you know the value of it? A. Yes, sir. [67]

Q. At that time? A. Yes, sir.

Q. What was the value of that?

A. \$100.00.

Judge Baum: That is objected to as incompetent, irrelevant and immaterial, and no proper foundation laid, and no time is stated, nor is the condition of the property; it is immaterial, there is no representation made by either defendant as to value.

The Court: The objection is sustained at this time. It is a well recognized rule of law that market value is the value at the place the property is situated, and the price fixed, or the value fixed by a seller and a buyer willing to buy and sell. The buyer willing to buy but not forced to buy, and the seller willing to sell but not forced to sell. That is a well recognized rule of law in fixing market value.

Q. You are familiar with the property that was mortgaged to Mr. Courtney?

A. That is right.

Q. You had inspected it recently?

A. Yes, sir.

Q. You had made up a list of it?

A. I helped make up a list.

Q. You are familiar with the condition in which it was at that time? A. Yes, sir. [68]

Q. Bearing in mind the definition of market

(Testimony of Edward B. Haygood.)

value that the Court has given us, can you fix the value of this property that was mortgaged to Mr. Courtney?

Judge Baum: We object to that as incompetent, irrelevant and immaterial, and no proper foundation laid.

The Court: The objection is sustained.

Q. Bearing in mind the condition of the property, the location of the property as you had it examined, or as you had examined it, and the market value of property is the value offered by a person who doesn't have to buy, and the price that he would pay to a person who doesn't have to sell, but would sell, can you fix the value of the 500 feet of air hose?

The Court: I don't think it is material; the objection, if it was renewed, would be sustained. The property was mortgaged and the only complaint you have is that there was property that was not included in the mortgage that the bank had been instructed to put in.

Q. At the bank, what was said by Mr. Courtney to Mr. Davis about including all of the property?

Judge Baum: That is objected to, it has been asked and answered.

The Court: Yes, he has testified that Mr. Courtney instructed Mr. Davis.

Q. Was there any reference made in that conversation with regard to a 150-horsepower [69] motor?

Judge Baum: We object to that, the witness has

(Testimony of Edward B. Haygood.)
detailed the conversation in full. This is leading and suggestive.

The Court: The objection is sustained.

Mr. Bistline: That is all.

Cross-Examination

By Judge Baum:

Q. You had prepared a list of the property?

A. Yes, sir.

Q. When did you prepare that?

A. Oh,—it was after,—I would say it was after May, it was about June or July.

Q. That was property that was owned by the mining company that was clear?

A. That is right.

Q. You had that list with you that day at the bank?

A. No, I didn't have my list at the bank.

Q. There was a list at the bank?

A. If there was I didn't see it.

Q. Didn't you know,—or rather, didn't you hand Mr. Davis a list?

A. Long before that, and that contained a list of all of the property that the mining company owned that was clear.

Q. Would you recognize that list again?

A. I think so. [70]

Q. Was that list which was handed to you the same list that was handed to Mr. Davis by you?

A. It is.

(Testimony of Edward B. Haygood.)

Q. That is the list? A. Yes, sir.

Q. That was prior to the time that this mortgage was executed? A. Yes, sir.

Q. That comprised all of the property of the Fourth of July Mining Company that was clear?

A. That is right.

Judge Baum: We move the admission of Defendants' Exhibit No. 11.

Mr. Bistline: To which we object on the ground that it is hearsay evidence, and it was not prepared in the presence of Mr. Courtney, and it has not been shown who prepared it, when it was prepared, or whether it was ever exhibited to Mr. Courtney by anyone.

Judge Baum: We will withdraw it at this time.

Q. When did you hold a corporation meeting with reference to this \$10,000.00 loan?

A. It was sometime before.

Q. You had a certified copy of the minutes there? A. No, we didn't.

Judge Baum: I believe that is all. [71]

Mr. Bistline: At this time the plaintiff will rest.

Judge Baum: I think, if the Court please, that Mr. Courtney testified that he wanted in the mortgage all of the property that they owned, and this witness has testified that all of the property was in this list, that it was all of the property that they owned, and that was the reason for the offer of this exhibit.

The Court: That is propably true, but in view of the testimony that has gone in, in view of Mr.

Courtney's testimony, I will not admit the exhibit.

Judge Baum: I would like to make a motion.

The Court: Very well, I will excuse the jury at this time.

(In the absence of the jury.)

Judge Baum: Comes now the Defendants, and each of them, the Plaintiff having rested, and moves the Court for an order of non-suit for the following reasons:

(1) That sufficient evidence has not been adduced during the trial to warrant the court in submitting this to the jury in this;—in particular that at no time has any evidence been introduced showing the value of the property that was presumed to be put in the mortgage; likewise, the property that was included in the mortgage, now value has been shown; that is, as to whether [72] the value of the property in the mortgage was or was not sufficient to pay off the obligation of the plaintiff;

(2) For the further reason that it is not shown that there was ever any foreclosure property, that the property is not now in existence, it has not been shown, nor what the value of it is now or was at the time of the discovery, if there was a discovery, that the mortgage did not include all of the property;

(3) That there has been a total failure to show any damage of any amount of money, not one dollar. There is no sufficient evidence to submit the

matter to the jury, and there can be none until the security has been exhausted. There is no evidence of any wanton waste of the property, in fact, there is no evidence whatever to go to the jury in this matter.

The Court: I will take a five-minute recess and determine whether I wish to hear any argument on this motion.

3:45 P.M. o'Clock—May 18, 1951

The Court: In this case I don't feel that there is any necessity to have any argument on this motion. I will treat the motion as a motion for a directed verdict under the rules of the court. It seems to me that in this case there is an entire failure of proof that the plaintiff had been damaged. It also appears from the evidence that [73] he received stock in the mining company as a consideration for an extension of the mortgage, and that was on or about the date that he was furnished a copy of the mortgage by the bank. This act of his in accepting the stock would indicate that he accepted the mortgage,—there is no evidence that he returned the stock after he discovered the mortgage was not to his liking. There is no evidence at all but that he received something of value in the stock from the company. There is no evidence that he has exhausted his security, that is, the property that he had a mortgage on. There is no evidence in the court's judgment of any fraud on the part of the bank. If I were to present this

to the jury and they had to discuss this evidence and try to arrive at a verdict I know of no way they could determine any amount of damage that the plaintiff has sustained. I feel that there is nothing for me to do but to grant the motion.

I will appoint Mrs. McIntyre, Juror No. 1, as foreman of the jury, and I will direct you as foreman of the jury to sign this verdict for the defendants and against the plaintiff.

You, of course, understand that you assume no responsibility because the Court has decided it as a matter of law.

Mr. Clerk, you may hand the verdict to Juror No. 1 so that she can sign it. First, I will excuse the two alternate jurors.

(Whereupon the verdict was signed by the Foreman, designated by the Court.) [74]

State of Idaho,
County of Ada—ss.

I, G. C. Vaughan, Hereby Certify that I am the official Court Reporter for the United States District Court for the District of Idaho; and

I Further Certify that I took the evidence and proceedings had in and about the trial of the above-entitled cause in shorthand and thereafter transcribed the same into longhand (typewriting); and

I Further Certify, that the foregoing transcript, consisting of pages numbered, consecutively, to page 74, is a true and correct transcript of the evidence given and the proceedings had in and about the said trial.

In Witness Whereof, I have hereunto set my hand
this 24th day of August, 1951.

/s/ G. C. VAUGHAN,
Official Reporter.

[Endorsed]: Filed September 4, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the following papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP):

1. Complaint.
2. Defendants' Motion for Bill of Particulars, dated February 22, 1950.
3. Defendants' Motion for More Definite Statement, dated February 23, 1950.
4. Amended Complaint.
5. Answer to Amended Complaint.
6. Transcript of Testimony (all proceedings stenographically reported in regard to the trial).
7. Verdict.
8. Judgment.
9. Notice of Appeal.

10. Motion and Order Extending Time for Appeal.

11. (The designation will be forwarded as soon as it is received and filed. The above designation was made by telephone on this date.)

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, this 5th day of September, 1951.

[Seal] /s/ ED. M. BRYAN,
Clerk.

[Endorsed]: No. 13085. United States Court of Appeals for the Ninth Circuit. Howard M. Courtney, Appellant, vs. Custer County Bank, a Corporation, and Oliver T. Davis, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed September 7, 1951.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the Circuit Court of Appeals
for the Ninth Circuit

HOWARD M. COURTNEY,

Appellant,

vs.

CUSTER COUNTY BANK, an Idaho Banking
Corporation, and OLIVER T. DAVIS,

Defendants.

DESIGNATION OF RECORD ON APPEAL

Comes now the appellant in the above-entitled action and designates the following portions of the record, proceedings and evidence to be contained as the record on appeal in this action:

1. Original Complaint.
2. Defendants' Motion for Bill of Particulars, dated February 22, 1950.
3. Motion for More Definite Statement, dated February 23, 1950.
4. Amended Complaint.
5. Motions to Dismiss Amended Complaint.
6. Motions to Strike Amended Complaint.
7. Order of Court Overruling Motion to Dismiss and Denying Motion to Strike.
8. Answer to Amended Complaint.
9. Entire Transcript of the Evidence taken at trial.
10. Entire Transcript of All Proceedings stenographically reported at the trial.
11. Verdict.

12. Judgment Entered thereon.
13. Notice of Appeal.
14. Order Extending Time for Appeal.
15. This Designation.
16. Statement of Points.

/s/ BISTLINE & BISTLINE,
Attorneys for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 21, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS

Appellant states that the points upon which he intends to rely on appeal in the above-entitled action are as hereinafter set forth, and that he deems the entire record on appeal as necessary for the consideration of the points to be relied upon, namely:

1. The trial court erred in sustaining objections to the testimony of the plaintiff and witness Howard Courtney with respect to the value of the property which had been omitted from his mortgage.

2. The trial court erred in sustaining objections to the testimony of E. B. Haygood, president of the Mining company, with respect to the value of the property and mining equipment which had been omitted from the mortgage of the Mining Company to Courtney.

3. The trial court erred in directing a verdict for the defendants in the above-entitled matter for the following reasons:

(a) There was proof that the bank and defendant had been directed to include certain property on the mortgage in question, and that the property omitted was of value, and that plaintiff had been damaged by reason of the omission thereof.

(b) In ruling that the plaintiff had received consideration for the extension of his mortgage, thereby accepting the mortgage, when in fact he had never seen the mortgage until some time after the renewal thereof.

(c) In ruling that in an action for fraud, that appellant was first required to exhaust his security.

(d) In ruling that there was no evidence of fraud on the part of the defendants.

4. The trial court erred in entering a judgment for the defendants, for the same reasons set forth in (3) hereinabove.

5. The trial court erred in not permitting said cause to be determined by the jury, in that there was sufficient evidence to make a prima facie case of fraud and maintain an action for rescission by reason of fraud.

.....,

Attorney for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 10, 1951.

No. 13085

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HOWARD M. COURTNEY,

Appellant

vs.

CUSTER COUNTY BANK, A Corporation and
OLIVER T. DAVIS,

Appellees.

Brief of Appellant

Appeal from the United States District Court for the District
of Idaho, Eastern Division

R. DON BISTLINE
Pocatello, Idaho
Attorney for Appellant

FILED

DEC 1 - 1951

O. R. BAUM
Pocatello, Idaho
RUBY Y. BROWN
Pocatello, Idaho
Attorneys for Appellees.

PAUL P. O'BRIEN
CLERK

No. 13085

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HOWARD M. COURTNEY,

Appellant

vs.

CUSTER COUNTY BANK, A Corporation and
OLIVER T. DAVIS,

Appellees.

Brief of Appellant

Appeal from the United States District Court for the District
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RUBY Y. BROWN
Pocatello, Idaho
Attorneys for Appellees.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOWARD M. COURTNEY,

Appellant

vs.

CUSTER COUNTY BANK, A Corporation and
OLIVER T. DAVIS,

Appellees.

Brief of Appellant

JURISDICTIONAL FACTS.

This is an action brought by appellant, plaintiff below, Howard M. Courtney, a resident of the State of California, against the Custer County Bank, an Idaho Banking corporation and Oliver T. Davis, a resident of Idaho, to recover the sum of \$10,000.

STATEMENT OF FACTS

In November, 1946, an Idaho mining corporation known as the Fourth of July Mining Company mortgaged certain mining equipment to the Custer County Bank of Challis, Idaho for the sum of \$7,500.00. The bank subsequently ascertained that some of the property mortgaged to it by

the mining corporation did not belong to the mining corporation, and further, considering the loan a poor one, proceeded to demand payment from the Company.

The Mining Company sought another source for funds, and succeeded in interesting Mr. Courtney in advancing \$10,000, after he had inspected the mining company property equipment.

Mr. Courtney went to Challis, Idaho, September 23, 1947, and with officials of the Mining Company went to the bank to transact the loan.

At that time the Mining Company was indebted on two loans, one to the bank secured by the mortgage on which there was property listed not belonging to the Mining company, and one to Roy E. Bassett secured by mortgage on a GMC truck and a portable welder, the loan being for \$1,000.

The bank, through its cashier, Oliver T. Davis, was engaged to prepare necessary papers and act as escrow holder of the \$10,000 to be paid by Courtney, and to act as his agent for the collection of payments on the new loan.

Mr. Courtney advised Mr. Davis, cashier of the bank, that before delivering the \$10,000, that Mr. Davis was to obtain a mortgage in favor of Courtney covering "all of the property on the bank's mortgage, and the property on the Bassett mortgage," and to ascertain that all such property was free of liens.

Mr. Davis, according to Courtney, agreed to do this. At that time, however, Mr. Davis knew that he could not pre-

pare a mortgage from the Mining Company to Courtney covering the same property as the bank held on its mortgage, for the very reason that the bank had ascertained the mining company did not own all the property listed on the mortgage to the bank. The property on the bank's mortgage not owned by the mining company was as follows: Large and small ore crushers, ball mill, 40 hp. engine, flotation machine, 150 hp. diesel motor.

Mr. Davis did not disclose this to Mr. Courtney, but remained silent. Furthermore, he did not advise Courtney that the bank could not carry out such instructions.

Mr. Courtney turned over the \$10,000 to the bank and shortly thereafter left.

The mortgage was prepared, executed by the mining company, and thereupon the \$10,000 disbursed by the bank. The mortgage was not prepared according to Courtney's instructions. The property listed above and the welder and GMC truck were omitted therefrom.

Courtney did not learn of the omission until August, 1948. In the meantime, the note had come due, and in consideration of the issuance of some stock, the note was extended. The stock so issued was delivered to Mr. Courtney the same day he discovered from a copy of the mortgage given him by the bank, that the instructions he had given had not been followed.

This suit is the action by Mr. Courtney to recover the \$10,000 from the bank by reason of the fraud perpetrated

upon him by the bank and its officer, the cashier Oliver T. Davis.

At the trial of the case, Mr. Courtney was asked concerning the value of the equipment left off his mortgage by the bank; the trial court refused to permit him to testify.

The president of the corporation was then called to testify as to the value of the property omitted from the mortgage; the trial court sustained objections to this line of testimony.

The trial court then directed the jury to return a verdict for plaintiff upon the grounds that the plaintiff had received stock for an extension of the mortgage, on or about the date he was furnished copy of the mortgage, indicating an acceptance of the mortgage; further, that plaintiff had not exhausted his security; further that there was no evidence of fraud on the part of the bank; and further that there was no evidence to enable a jury to determine damages.

The appeal is from that ruling of the trial court, as well as the rulings of the trial court with respect to admission of testimony of Mr. Courtney and Mr. Haygood as to the value of the property on the mortgage, and the property omitted from the mortgage.

HISTORY OF THE CASE

The original complaint in this action was filed January 13, 1950. Motion for Bill of Particulars and for More Definite Statement were filed February 25, 1950, by the defendants, and the court granted such Motions June 14, 1950.

Amended complaint was filed July 19, 1950, to which defendants filed a Motion to Dismiss and Motion to Strike. The court overruled the Motions without prejudice March 13, 1951, and defendants filed their answer to the amended complaint April 10, 1951. The case was tried May 16, May 17, 1951, and the court directed Judgment for Defendant.

SUMMARY OF PLEADINGS

Appellant's complaint recites the residence of the parties the existence of the defendant banking corporation; it pleads the making of a mortgage by the Fourth of July Mining Company to the defendant bank reciting the property mortgaged; it alleges the discovery by the bank of the fact certain property on the mortgage did not belong to the mortgagor, the withholding of that information by the defendants from plaintiff; the arrangements for plaintiff to make a loan to the Mining Company, and employment of the bank to handle the transaction and the directions given the bank, the acceptance of such instructions by the bank, knowing it could not comply thereto, the action of the bank and the banks violation's of the instructions.

It recites the damages by reason of the bank's fraud and disregard of instructions, and seeks restitution of the \$10,000 advanced by plaintiff. Attorney fees and punitive damages are also sought.

Appellees, in their answer to the amended complaint deny the existence of a cause action; as a second defense deny the existence of instructions to it by plaintiff, and deny fraud and

damages. As an affirmative defense the defendants plead laches; as a second affirmative defense, estoppel is plead; as a third affirmative defense, negligence is plead and a fourth affirmative defense repeats the first three. And defendants sought dismissal of the action.

QUESTIONS INVOLVED

The questions involved are:

1. The right of witnesses of plaintiff in this case to testify as to the value of the property omitted from the mortgage prepared by the defendant bank.
2. The nature of damage plaintiff had to prove in an action seeking restitution of money (\$10,000) paid over by reason of fraud of the defendants.
3. Whether the action of the defendants in omitting certain property from a mortgage which they had agreed to prepare for the plaintiff, constituted fraud.
4. Whether the omission of the defendants, acting in a fiduciary relationship on behalf of plaintiff, in not advising him of certain facts relating to the transaction, was a fraud of omission. That is, was the bank under any duty to disclose to plaintiff that some of the property on the mortgage of the minoing company held by the bank did not belong to the mining company held by the bank did not belong to mortgage being made by the mining company to the plaintiff, which new mortgage was being prepared by the bank at the instance of plaintiff.

SPECIFICATIONS OF ERROR

The trial court erred in holding that there was no evidence of fraud.

The trial court erred in holding that there was no evidence of damage, inasmuch as plaintiff was seeking restitution of his \$10,000.

The trial court erred in sustaining objections to the testimony of witness Howard Courtney as to the value of the property omitted from his mortgage.

The trial court erred in sustaining objections to the testimony of witness Haygood as to the value of the property on the mortgage, and omitted from mortgage.

Trial court erred in directing verdict for defendant.

SUMMARY OF ARGUMENT

Plaintiff, in bringing this action for fraud, had a choice of affirming the contract or agreement between himself and the bank, and seeking compensatory damages, or seeking rescission of his contract with the bank upon the grounds of fraud and return of his \$10,000 upon an obligation implied by law to return the same because of the fraud of the bank.

American Jurisprudence on Fraud,
Volume 24, pages 8-9 et seq. Section 190 et seq.
Section 202, at page 25.

In proving value of the property left off his mortgage, as well as value of the items thereon, plaintiff called as a

witness the President of the Fourth of July Mining Company, the corporation owning the property. The trial court sustained objections to this testimony. This was error for the reason a corporation officer who is shown to be familiar with the facts may testify on behalf of the corporation as to value of corporation property.

Weber v. West Seattle Land & Improvement Co.,
63 P. 2d 418 (Washington) ;

Travelers Indemnity Company v. Plymouth Box
Panel Company,
(Circ. Ct. of Appeals, 4th Circ.) 9 Fed. 218;

Appeal of Dubuque-Wisconsin Bridge Co.
(Iowa) 25 NW 2d 327;

Dallas Railway & Terminal Co. v. Strickland
Transportation Co.
(Texas) 225 S. W. 2d 901;

Hellstrom v. First Guaranty Bank,
(N.D.) 209 NW 212, 45 ALR 1487;

See also ALR notes:
5 ALR 1171, 11 ALR 1494-5.

Failure of a person acting in a fiduciary or confidential relationship to another to disclose knowledge of financial situation of a party is fraudulent conduct.

Bardach v. Chain Bakers, Inc., et al.
37 N. Y. Supp. 2d 584, affirmed
50 N.E. 2d 233;

Fox v. Cosgriff,
64 Idaho 448, 133 P. 2d 930.

Plaintiff fulfilled the elements of an action for fraud.

Kemmerer v. Pollard,
15 Idaho 34, 96 P. 206.

The facts proven by plaintiff established a fiduciary relationship, as defined by law.

See Section 2 (b), p. 7, Restatement of Trusts;
Section 874, p. 432, Restatement of Torts;
Words & Phrases, Volume 16, p. 513-522.

ARGUMENT

To begin with, what is the nature of plaintiff's action? It is a well established principal that a party bringing an action for fraud has a choice of remedies. The law in this respect is well summarized, supported by annotated cases, in Volume 24, American Jurisprudence, pages 8-9 et seq., Section 190 et seq. There it is said:

"When knowledge of the fact that fraud has been committed in procuring a contract is brought home to him, the party to it thereby aggrieved is put upon his election and the legal system offers him a choice of several courses of conduct and remedies to redress the effect of the fraud and false representations. He may elect to affirm the transaction and sue for the benefits to which he is entitled thereunder, or for damages for deceit. On the other hand, he may elect

to disaffirm the contract, frequently doing so by electing to rescind and be restored to his former position, recovering money paid out, or recapturing property, and in very many cases invoking the aid of a court of equity for the purpose of obtaining rescission and further relief,”

“It is well settled that the various course of conduct and remedies for the redress of fraud may be, and usually are, alternative and mutually inconsistent. Although a defrauded person may have the initial choice of courses of action and legal remedies of affirmation or disaffirmance, he must select his course of conduct. This course once chosen and acted upon in a manner deemed by the rules of law and equity to constitute an effectual choice or election and not a fruitless attempt at recourse to an unavailable remedy, is final and conclusive. The victim of the fraud cannot both affirm and disaffirm. Selection of one course of conduct is often held to constitute a waiver of the right to assert the other, or to give rise to an estoppel against its predication. In its essence, this doctrine is a broad application of the specific principal of election of remedies that a defrauded person may either affirm the contract and recover or disaffirm and rescind it, but cannot pursue to a final conclusion both remedies.”

Applying these principles to the instant action, let us review the situation. When plaintiff discovered his mortgage did not include the property he had asked be included thereon, what did he do? Did he affirm the action taken by foreclosing the mortgage as made, obtaining a deficiency and then suing for are damages he had suffered by reason of the bank's fraud? No, he proceeded at once against the bank, by such action

rescinding the agreement with them, and sought recovery of his \$10,000 loan. As plaintiff put it, he is out \$10,000, some one has it and he wants it back; he is not seeking damages for the fraud, but return of his money. The fraud is grounds for obtaining its return by rescission of the agreement whereby it was paid over to the bank. The object of the instant lawsuit is to obtain return of the \$10,000, not to seek some undertermined amount of damages, for example the difference between the value of the property actually mortgaged and what should have been mortgaged.

In directing verdict for defendant, the trial judge noted that plaintiff had not foreclosed. We urged that if plaintiff had foreclosed and then sought his damages, that such action would have been an irrevocable election on his part to affirm the contract and sue for damages by reason of the fraud of the defendants. His action would then have been in tort, and truly enough, the jury would have had no evidence upon which to determine plaintiff's damages.

As to the nature of the instant action, we again refer to American Jurisprudence, Volume 24, p. 25, section 202, from which it clearly appears.

“One of the frequently employed remedies at law for the redress of fraud is assumpsit or the code equivalent thereof, and as a general rule, one who has been fraudulently induced to part with money or personal property may waive the tort and sue in assumpsit as on an implied contract. Thus a defrauded party who in accordance with the law has rescinded a contract may come into a court of law for all the relief which such

court is competent to give him and in instance where he merely asks for a return of the consideration parted with by reason of the fraud he is entitled to maintain the action of assumpsit. If money alone has been transferred by the rescinding party upon the rescission the law implies a promise to return it which becomes a basis for a common-law action of money had and received. A cause of action on an implied assumpsit to recover back money paid on account of a contract rescinded as having been procured by fraudulent representations sounds in contract rather than in tort."

Naturally to maintain such an action, plaintiff must first, as he has done here, plead and prove the elements of fraud so that upon the proof of fraud, the obligation to return the money so obtained by defendants can be implied. And in his proof of fraud, plaintiff must show pecuniary damages entitling him to rescind the contract. The plaintiff below sought to prove all the elements of fraud in support of his action to recover the \$10,000.

The essential elements of a cause of action for fraud are established by the Idaho case of *Kemmerer v. Pollard*,¹⁵ Idaho 34, 96 P. 206. It holds, (page 38 of the Idaho reports)

"The law is well settled that where a party seeks to recover on the grounds of deceit and false and fraudulent representations that he must plead the particular representations made and that they were false and fraudulent and material and that the party injured believed and relied in such statements and acted upon the belief and with the understandings that such false and fraudulent representations were

true. He must also show in which instances they were untrue."

The Idaho courts have further held that failure to disclose facts may be fraud. See *Fox v. Cosgriff*, 64 Idaho 448, 133 P. 2d 930. In this case, the court held a complaint to state a cause of action which charged the following:

"the said plaintiff personally, and by and through his agents did specifically inquire of the defendants and each of them, . . . and notwithstanding said specific inquiry, the defendants did wrongfully, unlawfully and fraudulently fail, refuse, and neglect to disclose fully or at all to the plaintiff the facts concerning the condition of the business assets or affairs of the said Hailey National Bank and did wrongfully, unlawfully and fraudulently conceal from the said plaintiff the condition of the business, assets and affairs of and the actual intrinsic value of the capital stock of the Hailey National Bank, and did fail, refuse and neglect to disclose fully or at all, and did wrongfully, unlawfully and fraudulently conceal from the plaintiff the facts of the same and negotiations for the sale of the assets of the Hailey National Bank to the First Security Corporation of Idaho . . ."

We shall try to show that plaintiff's proof at the time of the directed verdict, met the above requirements. Simply stated, his proof showed: That the bank had a mortgage which had gone "sour," and wanted to get out from under it, having discovered there was property on their mortgage which did not belong to the mortgagor, Fourth of July Mining Company; that the mining company interested Mr.

Courtney in making a loan to it, Mr. Courtney having first familiarized himself with the mining equipment, and with the mortgage held by the bank; that Mr. Courtney knew that a part of the loan he was making would be used to pay off the bank loan, and some of it to pay off a loan secured by a mortgage on a truck and welder; that Mr. Courtney engaged the bank to look after his interest in the preparation and filing of the mortgage, lien search, and to make the collections due under the new note and mortgage, signing an escrow agreement; that among the directions given the bank by Courtney was one directing them to be positive to include upon his mortgage the same property they had upon their mortgage, (advising them as to one piece of property in particular, a large motor), as well as the truck and welder (Transcript pages 70-71, 76, 77, 84, 86, 87, 89, 91).

The record clearly shows the bank knew some of the property on the mortgage held by it, could not be included on the new mortgage for the reason that the bank had been informed and knew that the particular items did not belong to the Fourth of July Mining Company. Though acting in a fiduciary relationship with plaintiff, the bank did not divulge this information to plaintiff (Transcript, p. 53-54, 59), and Mr. Courtney testified that if he had been given this information he would not have made the loan (Transcript, p. 99). The record further shows Courtney did pay over to the bank \$10,000, and that he did not receive a mortgage covering all the property he had directed the bank to include thereon; that the following items were omitted:

GMC truck, welder, the ball mill, the flotation machine, two rock crushers, 150 horse power diesel with direct driven generator.

It is shown that the bank prepared the mortgage and disbursed the \$10,000 turned over to them by plaintiff, contrary to his instructions, and while acting in a confidential or fiduciary relationship.

At the trial of this cause the trial judge sustained all objections to offers of evidence of the value of the equipment of the Mining Company involved in the mortgages in question, both that on the mortgage and that omitted from the mortgage. We urge that this was error.

The qualifications of the witness Courtney were established, but the court refused him the right to testify.

Even greater error was the rejection of the testimony of the witness Haygood. He had testified he was President of the company, that he was familiar with the property of the company. Nonetheless the objection to his testimony was sustained.

The authorities are well established to the effect that an officer of a corporation who has testified he is familiar with the operations of the company and the value of its property may testify, the weight of his testimony being for the jury.

In *Weber v. West Seattle Land & Improvement Company*, 63 P. 2d, 418 (Washington), at page 421, it is said:

"It is settled law in this state that the owner of pro-

perty may testify as to its value upon the assumption or presumption that he is so far familiar with the property and its uses as to know its worth (citing case).

“If this be the rule as to one private owner, it must likewise be the rule as to all private owners. A corporation can give testimony only through an officer or agent, and if an individual owner may testify, then the one particular individual who controls and manages the corporation must of necessity be permitted to testify in order that the rule may be general and uniform in its application. In spite of some authority from other states which seem to look in the other direction, we think that equality and uniformity require that respondent’s testimony was admissible.

“Appellant itself took advantage of the same rule and its managing officer who never did own the property gave his opinion as to the value.”

In *Travelers Indemnity Company v. Plymouth Box & Panel Company* (Circuit Court of Appeals, 4th Circ.) 9 Fed. 2d 218, at page 223, it was held:

“Appellant particularly alleges error in the admission of the testimony of plaintiff’s witness. Still, as to the sound value of the machine before the accident on the ground that he was not qualified to express an opinion; but it appears from the record that he was the president of the insured and had been familiar with the particular machine in operation for several years. As the owner’s representative he was therefore entitled to express an opinion as to value the weight of which was wholly for the jury. (Wigmore on Evidence (2d. Ed. Vol. 1, Sec. 716; *Barrett v.*

Fournial (2d Circ.) 21 F. 2d 298; Chicago and E. R. Co. v. Ohio City Lumber Company, 6 Circ. 214 F. 751; Union Pacific R. Co. v. Lucas, 8 Circ. 136 F. 374."

Other authorities and collection and review of authorities on the same point:

Appeal of Dubuque-Wisconsin Bridge Co. (Iowa)
25 NW 2d 327;

Dallas Railway & Terminal Co. v. Strickland
Transportation Co., (Texas)
225 S. W. 2d 901;

Note, 5 A.L.R. 1171;

Note, 11 A.L.R. 1494-5;

Hellstrom v. First Guaranty Bank (N.D.)
209 N.W. 212;
45 A.L.R. 1487.

As to the testimony of Mr. Courtney himself: he testified he had seen the machinery, that he had dealt in machinery similar to that in question, and that he was familiar with the value of such equipment. Nonetheless the court barred his testimony.

It must be remembered that the mining machinery in question was situate on a mountainside about 60 miles from Challis, a little community of 600. It was more or less generally inaccessible, and it is not at all likely that any person, or persons, qualified as experts could testify as to the value

of that machinery at the time of the making of the mortgage. The rule laid down by the trial judge as to value is undoubtedly correct, but he inferred in his ruling that it was unlikely that any one would be able to meet the requirement and testify as to this particular machinery, unless it were a mining equipment salesman, brought to the area for that purpose, at the very time the mortgage was being made, for the purpose of fixing a value of the equipment at that time, at that location, in that precise condition. We submit it would have been impossible to anticipate this lawsuit and arranged for such a witness, and that it was an abuse of discretion not to permit Courtney to testify. A foundation was laid showing his familiarity with this type of equipment; that he had inspected it at the point where it was earlier in the year, and was familiar with it.

The trial court, in directing verdict for the defendant, ruled there was no evidence of fraud.

The purpose of this evidence was to prove one of the elements of fraud, to-wit, pecuniary damages to plaintiff, against the defendants, justifying rescission and restitution by reason of fraud of the other party though as we have noted before, plaintiff was not seeking damages for the difference between the equipment to have been included and that actually included on the mortgage. Plaintiff was seeking restitution of his \$10,000, and evidence of the value of the property omitted was to show a material misrepresentation or omission.

Even though evidence as to actual value was rejected

by the trial court, we urge that the trial court erred in ruling there was no evidence of damage. Since plaintiff sought restitution of the \$10,000 paid out, and not the difference between the value of the property supposed to have been on the mortgage and that actually included, he would not have to prove exact values.

Items left off the mortgage, which Mr. Courtney had insisted should be included, were fully described and itemized to the jury. It would be a simple matter for the jury to draw from their own experience and background as to the materiality and substantiality of the items omitted, and determine whether Mr. Courtney was damaged and defrauded by the omission of such items. Jurors should have been permitted to use their own knowledge in determining if the plaintiff had been defrauded of value by such omission;

See Jones On Evidence, Vol. 1 p. 234 3d Ed.

Determination of this case did not require a determination of the exact value of the omitted items, but simply if they were of such value that their omission constituted a fraud upon the plaintiff. The fact that a GMC truck and a portable welder, previously mortgaged for \$1,000, had been omitted from plaintiff's mortgage, would in and of itself establish that plaintiff had suffered pecuniary loss and been deprived of something of value by the fraud of the defendants. The jurors did not need to have submitted to them the precise or exact value of such items. It would be presumed that such property had some kind of value, and since it was not

on the mortgage, then the plaintiff had been the victim of fraud.

As we have urged and pointed out before, when the trial court stated in directing his verdict there was no measure of damages, he totally ignored plaintiff's theory of the case—plaintiff's right to restitution of the \$10,000.

The trial court, instead, seemed to go upon the theory that plaintiff had to foreclose, ascertain his loss, and sue for the difference. Such is not the case when plaintiff who has been defrauded, seeks restitution.

In seeking restitution, when plaintiff proves fraud and some pecuniary damage, he recovers not the pecuniary damages but the money or property initially expended or delivered by him.

There was ample evidence before the jury to determine that there had been damage to plaintiff by the omission of the property from his mortgage, and if such was the case, that by reason of the fraud, plaintiff was entitled to restitution of his \$10,000.

On the basis of foregoing argument we urge the trial court erred in ruling there was no evidence of damage to plaintiff, and that the trial court erred in asserting plaintiff was required to "exhaust his security" first before maintaining this action.

We next urge that the trial court, in directing its verdict erred in ruling there was no evidence of fraud.

At the time the court directed verdict for the defendant, plaintiff had adduced evidence, which if believed, established:

1. That the plaintiff employed and relied upon the defendants to handle the making of a mortgage between him and the Mining Company.

2. That the defendants accepted such employment.

3. That the plaintiff gave defendants certain instructions to be followed with regard to the preparation of the mortgage.

4. That the defendants, upon hearing the instructions, knew they could not comply with such instructions in several particulars; but that the defendants did not advise the plaintiff of that fact.

5. That they accepted the employment, representing they could do so, when in fact they could not comply with the terms prescribed by plaintiff.

6. That the defendants failed to perform according to instructions, omitting the welder and truck from the new mortgage, as well as the property on their mortgage which they had learned did not belong to the Mining Company.

7. That the plaintiff delivered to the defendants \$10,000 to be disbursed according to his terms and instructions; the defendants accepted this money knowing they could not comply with his terms, and did disburse it contrary to his instructions, and that part of the money was used to pay off their own "bad" loan.

Plaintiff's evidence established these facts; though defendant denied this in his pleadings and would have undoubtedly attempted to sustain such denial with proof, nonetheless, we urge that this evidence created an issue of fact for the jury as to fraud, and that the court erred in taking away this issue from the jury and arbitrarily ruling and directing a verdict for defendants.

Whether the jury would accept plaintiff's version or defendant's version of the transaction relating to the preparation of the mortgage was for their determination, not for the court.

Plaintiff's evidence clearly established that the defendants, while acting in a confidential, or fiduciary relationship, withheld certain information from plaintiff. Such action is fraud.

We have searched the lawbooks for a case similar to the instant one. The case coming nearest to the instant facts in holding that failure to disclose information, when acting in confidential relationship, is fraud is the case of *Bardach v. Chain Bakers, Inc., et al.* 37 New York Supp. 2d, 584, affirmed without opinion, 50 N. E. 2d. 233.

Although the opinion is short and can be quickly read, we shall not set it out here, but will set forth the holding:

“An escrow holder under a contract of purchase and sale of the retail portion of a bakery owed the buyer as a ‘fiduciary’ the highest kind of loyalty and was under a duty to disclose the situation as to the finan-

cial difficulties of the bakery and its officer which had come to the holder's notice.

“Where escrow holder under a contract to purchase a bakery failed to disclose his knowledge of the financial difficulties of the bakery and its officers and actively aided prosecution of the fraud against buyer by statements to buyer and in disposing of escrow moneys so as to prevent buyer's attention from being drawn to the situation, buyer was entitled to damages for ‘fraud’ from the escrow holder upon rescission of the contract.”

The instant case is comparable to this. The bank had agreed to act as escrow holder; the escrow agreement and copy of it were adduced in evidence. The bank had knowledge of the financial difficulties of the Fourth of July Mining Company, but failed to disclose them to the plaintiff. The bank actively engaged in the fraud not only by withholding this information, but by preparing the mortgage contrary to the instructions of the plaintiff, and disbursing the \$10,000 when it had not followed his directions.

While the court in the Bardach case, *supra*, directed judgment for the plaintiff, we do not go that strong, but we do urge that there was an issue of fact on fraud and damages to go to the jury, and that the court definitely erred in directing verdict for the defendants.

The evidence throughout showed that plaintiff relied upon the defendants and entrusted to them the performance of certain acts with respect to this mortgage. We believe this created a fiduciary relationship. To determine whether there

existed a "fiduciary relationship" between plaintiff and defendants, we turn to the definition of that term appearing in Restatement of Trusts and of the liability thereunder in Restatement of Torts.

In Restatement of Trusts, Sec. 2 (b) at page 7, it is said:

"A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matter within the scope of the relation. . . . If the fiduciary enters into a transaction with the other and fails to make a full disclosure of all circumstances known to him affecting the transaction, or if the transaction is unfair to the other, the transaction can be set aside by the other."

And at page 432, Section 874 of Restatement on Torts:

"A person standing in fiduciary relationship with another is liable to the other for harm resulting from a breach of duty imposed by such relationship."

A collection of definitions of fiduciary or confidential relationships appears in Volume 16, Words & Phrases, page 513 through 522, among which are some of the following:

"Those informal relations which exist whenever one man trusts and relies upon another.

"Where a person has rights and duties which he is bound to exercise for the benefit of another, it can be said a fiduciary relationship exists; placing of confidence on one side, superiority and domination on the other, or influence."

We think these definitions apply to the instant matter wherein defendants were engaged to prepare a mortgage and act as escrow holder, and in the course thereof failed to disclose the information they had concerning the mortgage made by the Mining Company to the bank which mortgaged property not belonging to the company, and that if question had been submitted to the jury, there was sufficient evidence to establish fraud by reason thereof, and sufficient evidence to have sustained a finding by the jury that the plaintiff had given the defendants instructions, and that defendant knew they could not perform such instructions, yet accepted the employment and violated or disregarded the instructions. Such findings of fraud would justify plaintiff's rescission of the contract and entitle him to the return of the \$10,000 delivered to the bank, if plaintiff's theory as to damages is (and had been) followed.

We cannot emphasize too strongly that we believe the trial court erred in holding that plaintiff was first required to foreclose his mortgage. Such action would have been an affirmance of the actions of the bank. The bank was an escrow holder. Money had been deposited with it to be disbursed upon said conditions. The conditions had been violated. Under such circumstances, foreclosure of the mortgage as ultimately prepared by the bank would have been a ratification by plaintiff of the acts of defendant, and he would be unable to maintain an action of restitution of his moneys after discovering the fraud of the bank.

We respectfully urge in closing that the trial court erred for all the foregoing reasons in directing verdict for the defendants in that there was ample evidence of fraud, that the trial court erroneously deprived plaintiff of the admission of evidence relating to value, and that even so, there was sufficient evidence of damages to justify the case going to the jury on plaintiff's theory of restitution of the \$10,000 by reason of fraud.

Whether plaintiff gave such direction, whether defendant understood them, violated them, did not make full disclosure were all questions of fact for the jury and should not have been determined by the trial court.

CONCLUSION

In conclusion we respectfully submit that upon the record and law, that the judgment entered in the District Court should be reversed and a new trial granted, and that upon such new trial evidence be permitted to be adduced in accordance with the authorities of this brief, and that the trial court be directed that the evidence adduced in the instant matter is deemed sufficient to permit the cause to go to the jury. And appellants seek their costs on appeal.

Respectfully submitted,

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No. 13085

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Appeal from the United States District Court for the District
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FILED

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Appellees.

Brief of Appellees

Appeal from the United States District Court for the District
of Idaho, Eastern Division

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STATEMENT OF FACTS

In as much as we feel that appellant's summary of the facts of the case departs in certain material particulars from the evidence adduced at the trial, we would like to present our own statement of facts.

In September or October, 1946, the Fourth of July Mining Company mortgaged certain equipment to Appellee Custer County Bank, for \$6000.00 (Tr. p. 52). In May or June, 1947, Appellee Oliver T. Davis, Cashier of the bank, learned that some of the mortgaged equipment had not been paid for (Tr. p. 53-54). The loan at this time had been due for some time and efforts to collect it were unavailing.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HOWARD M. COURTNEY,

Appellant,

vs.

CUSTER COUNTY BANK, a Corporation, and
OLIVER T. DAVIS,

Appellees.

Brief of Appellees

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ing. At the receipt of the news, additional fruitless efforts were made to collect the debt. The mortgage was never foreclosed (Tr. p. 56-57).

Meanwhile, Appellant Howard M. Courtney had become interested in the Mining Company and went to Challis in September, 1927, to make a loan to it. Together with several officials of the Mining Company, he went to the bank and met Mr. Davis (Tr. p. 67-70). Davis was requested by the parties to draw a mortgage and he was also asked if the bank would act as escrow holder. Davis, on behalf of the bank, agreed to act as escrow holder for Courtney and the Mining Company and an escrow agreement, sometime after the mortgage was drafted, was drawn up and signed (Tr. p. 58). The testimony conflicted as to whether or not Davis was instructed by Courtney to include in a mortgage from the Mining Company to Courtney equipment identical with that in the mortgage from the Mining Company to the bank (Tr. p. 60, 84). Courtney stated he had seen a copy of the Bank's mortgage in Los Angeles but had never checked it against the original in the Recorder's office (Tr. p. 85). Davis prepared, at a time that the officers of the Mining Company and Courtney were present, the mortgage and a note for \$10,000.00. He was asked to prepare an assignment of certain mining leases as part of the security but refused. The assignment was prepared by someone else (Tr. p. 60). This assignment was signed by Appellant Courtney.

Courtney handed to Davis, as chashier of the bank, a

check for \$10,000.00 to be deposited to his, Courtney's account. The testimony conflicted as to whether Courtney then gave a check payable to the Mining Company directly to an officer of the Mining Company, who endorsed it and gave it to Davis, as cashier, to deposit to the credit of the Mining Company, or whether the check was given first to Davis to transmit to the Mining Company (Tr. p. 63, 72). The Mining Company, by its authorized officer, then delivered the check to the bank in payment of the loan (Tr. p. 66, 87). All of the business except the filing of the mortgage had been transacted before Courtney left. The escrow agreement, the note, the mortgage, and the assignment of the leases had been drawn up and signed (Tr. p. 66). Appellant Courtney stated that he knew nothing about the assignment, but at the time he was on the stand he was handed the assignment and it bore his signature and he admitted that he must have signed it as his name was in his handwriting, hence we assume it was completed before he left. (Tr. p. 99, 100, 101 and Ex. No. 6). Courtney did not ask for a copy of his mortgage at that time (Tr. p. 98).

The note became due in March, 1948, and Courtney granted an extension on it at that time (Tr. p. 94, 99). The Bank and Davis were not consulted as to the extension and to the depositing in the Bank by the Mining Company of certain stock as a consideration for such extension. Under the escrow agreement, Courtney had an option to receive share of stock in the Mining Company in lieu of money (Tr. p. 94). The stock deposited at the time the extension was

granted was additional stock in the Mining Company, and other stock than that referred to in the escrow agreement, the same being left there by the Mining Company when the extension was agreed upon by the Mining Company officials and Appellant Courtney. In August, 1948, Courtney returned to Challis and tsked for, and received, a copy of his mortgage from Davis. He stated while on the witness stand that he noticed then for the first time that the equipment mortgaged was not identical with that on the morgage which the Bank had held (Tr. p. 90). At the same time, namely after being apprized of the fact of what the mortgage contained, he accepted two certificates of stock (the additional stock) in the Mining Company of 2000 shares each (Tr. p. 95). That was part of the consideration for extending the payment date of the note eleven months (Tr. p. 95).

Courtney brought this action against Davis and the Bank to recover the \$10,000.00 he had paid out, alleging that he had parted with the money as a result of a fraudulent concealment on the part of Davis and the Bank of the fact that certain equipment enumerated in the mortgage from the Mining Company to the Bank was not owned by the Mining Company.

The Trial Judge directed a verdict for the defendants, after the Plaintiff had presented his case, on the grounds that there was no evidence that the Plaintiff had been damaged, that the Plaintiff's act in accepting stock and not returning it indicated that he accepted the mortgage, that the stock constituted something of value, that there was no evidence

that the plaintiff had exhausted his security, and that there was no evidence of any actionable fraud, insofar as the Bank and Davis was concerned.

SUMMARY OF ARGUMENT

A general assignment of specifications of error is inadequate and insufficient and presents no question for review:

Northern Central Coal Co. v. Barrowman,
246 F. 906, 159 C.C.A. 178;

Miller-Crenshaw Co. v. Colorado Mill
& Elevator Co. 84 F. (2d) 930,
affirmed, 87 F (2d) 457;

Burton v. Carey,
82 F. (2d) 657;

Schmidt v. U. S.,
63 F. (2d) 390;

Jones v. Futrall,
75 F. (2d) 418.

Remedies for the redress of fraud are alternative and mutually inconsistent. One may either affirm a contract and recover damages or disaffirm and rescind it, but cannot pursue both remedies. Once he has made an election, he is estopped from predicated another course of conduct.

24 Am. Jur. p. 9—Sec. 191—Fraud
and Deceit.

The plaintiff-appellant cannot avail himself of the remedy of rescission because to recover money paid over through fraud, it is necessary to establish that the defendant has received money belonging to the plaintiff, since that is the fundamental fact upon which the right of action depends. It is not sufficient to show that the defendant has by fraud or wrong caused the plaintiff to pay money to others, or to sustain loss or damage for that is not the issue presented in such an action.

National Trust Company v. Gleason,
77 N.Y. 400, 33 Am. Rep. 632;
4 Am. Jur. p. 512—Sec. 22—Assumpsit.

Furthermore, his act in accepting further consideration in the form of stock constituted an election not to pursue the remedy of rescission.

24 Am. Jur. p. 36—Sec. 210—Fraud
and Deceit.

Therefore, we are forced to the conclusion that the plaintiff-appellant affirmed the contract and sought damages for an alleged fraud. But if this were his theory of action he failed to make out a *prima facie* case, because there is no evidence that the plaintiff has been damaged, because there is no evidence that the plaintiff has exhausted his security, and because the plaintiff has not proven the fact of fraud, and likewise no damage.

The trial court did not err in sustaining objections to the

testimony of witness Courtney as to the value of property omitted from his mortgage, because it was not shown that he had the requisite qualifications as an expert to testify at that point.

2 Wigmore on Evidence p. 640 2nd Ed.

The trial court did not err in sustaining objections to the testimony of witness Haygood as to the value of the property because it was not shown that he qualified as an expert. The fact that he was President of the Mining Company did not in and of itself constitute him an expert.

5 A.L.R. 1171 (Annotation)

“It seems that the rule which permits an owner of property to testify as to its value does not include an officer of a corporation, either public or private.”

There was no evidence in the case of fraud on the part of the defendants.

Escrow instructions cannot create a general agency, but create only a limited agency of the escrow holder. Consequently, his obligation towards his individual principals is quite different from that of a general agent to his principal.

Blackburn v. McCoy,
37 P. (2) 153;

Nelson v. Ashton-Jenkins Co.,
242 P. 408, 66 Utah 351.

The facts as shown by the record do not constitute a relationship of such a nature that any damages are allowable, the most that can be said was that Davis acted as a person drafting a mortgage and that thereafter and subsequent to the drafting of the mortgage an escrow was set up and that no terms of the escrow were violated.

ARGUMENT

The Court will note that after the Amended Complaint was filed, the Appellees directed certain motions thereto, and the trial Court in disposing of these motions stated thusly:

“It is ordered that the motions be and each of them is hereby overruled without prejudice and the matters raised by the Motions will be considered by the Court upon the trial of the cause upon its merits.”

The Appellees at the time of filing the motions, asserted and now assert that the Amended Complaint did not state a claim against either of the Appellees. We believe a reading of the Amended Complaint will disclose that the Appellees were correct in their assertion that no valid claim was stated against them.

An escrow agent is an agency that is strictly limited; that is an escrow agent acts as a neutral so to speak, in a transaction, holding the papers that are placed with it, and carrying out the instructions as contained in the escrow directions.

In the instant case, the company paid the escrow fees. An escrow agent is not one holding a position of trust as to one person only and not to the other, but is a person appointed by both parties for a particular purpose.

The Appellant specifies in the main three errors (Specifications of error p. 7, Appellant's Brief), namely:

- (1) In holding there was no fraud;
- (2) No evidence of damage and in refusing to permit witnesses Courtney and Haygood to testify;
- (3) In directing a verdict for the defendant.

Appellant failed in the specifications of error as to fraud, to point out the evidence that showed fraud; in other words, the Appellant did not specify in what manner, and where the evidence was that pointed to fraud on behalf of the appellees, and as we understand it, a general statement that the Court erred in holding that there was no evidence of fraud, without particularly pointing out the respects in which the insufficiency exists, is too general and is not a substantial compliance with the requirements as laid down by this Court.

The same objection in directing a verdict lies in the specification of errors as to directing a verdict for the defendant, namely; no reasons were given in such specifications of error as to why the Court erred, hence no reviewable question is presented.

The following cases uphold the facts as expressed in the foregoing paragraphs:

General assignment that upon pleadings, evidence, and record verdict should have been for plaintiff in error is not available.

Northern Central Coal Co. v. Barrowman,
246 F. 906, 159 C.C.A. 178.

Assignment of error is insufficient which simply invites court to search record for error.

Miller-Crenshaw Co., v. Colorado Mill & Elevator Co.,

84 F. (2d) 930, affirmed 87 F. (2d) 457.

Assignments of error merely complaining of action of corporation commissioner held to present nothing for review on appeal from decree dismissing bill for appointment of receiver for savings and loan associatoin.

Burton v. Carey,
82 F. (2d) 657.

Assignments that court erred in directing verdict and in entering judgment thereon held insufficient to present question for review.

Schmidt v. U.S.,
63 F. (2d) 390.

Specifications of error challenging trial court's

“holdings,” referring to reasons given in opinion for conclusion reached, presented no reviewable question.

Jones v. Futrall,
75 F. (2d) 418.

While Appellees believe that no discussion on the merits need be had as to the above referred to specifications of error, we will, however, without waiving our objections, discuss on the merits of the specifications of error.

One who has been injured by fraud has an election to accept the situation and recover damages or to repudiate the agreement and be placed in statu quo. He must elect between one or the other; he cannot do both.

37 C. J. S. p. 354—Section Fraud—Election of Remedies.

It is stated in *Young v. Main*, 72 F. (2) 640:

“This court has determined that, where a contract is obtained by fraud, the person defrauded has two remedies, and, as they are inconsistent, he must elect which one of the remedies sought he shall pursue. He may in effect affirm the contract and sue the party who defrauded him for his damages, or he may repudiate the contract and recover the purchase price paid. As these rights are inconsistent, he cannot do both.”

The Appellant states that he has elected to pursue the

remedy of rescission, seeking to regain the \$10,000 which he paid as a loan to the Mining Company. We cannot see how this action can be maintained in view of the fact that the Appellees did not receive, and did not have, at the time the action was commenced, the money which the Appellant is seeking. One must bear in mind that the Mining Company was not made a party to the instant action. As it is said in 4 American Jurisprudence, p. 512, Sec. 22—Assumpsit:

“In order to support a count in assumpsit for money had and received it must in general appear that the defendant has actually received and has in his hands money, or something which has been received as money, belonging to the plaintiff, which it is his duty to immediately pay over. Indeed, there is authority that in order to support the count, it must appear that the identical money in the defendant's hands was previously in the plaintiff's possession or is the proceeds of property to which the plaintiff was entitled.”

There is a conflict in the testimony as to whether Davis handled the check from Courtney to the Mining Company or whether it was given directly to an official of the Bank by Courtney. If it were given directly to the Mining Company, appellant obviously had no cause of action because appellees never had their hands on it. Even if the check were first handed to Davis, (and Courtney's testimony to this effect is not very convincing), Davis could not be said to have taken it for his own use or for that of the bank. He could not have derived any benefit from it. He would have

taken it solely as a conduit, to deliver it to the Mining Company. In addition, the check cannot be classified as money, or something which has been received as money. It was made out to the Mining Company as payee and obviously a third party could not cash it. To Davis it was worthless. The giving of the check merely assisted in closing the deal. This case is analogous to that of *Beardslee v. Richardson*, 11 Wendell (N.Y.) 25, 25 Am. Dec. 596, in which it was held that one who received a sealed letter containing money for delivery to another and failed to deliver it was not liable in an action for money had and received where there was no evidence of his having opened the letter, as the money could not be said to be money in the defendant's hands so long as the seal remained unbroken. Or in the Court's own language:

"If the defendant was liable upon the money counts, he was not liable as bailee, but as having received the money of the plaintiff for his own use. The evidence does not prove that fact, nor does it show that he received it otherwise than in a sealed letter. It can not be said to be money in the defendant's hands; unless he broke the seal, it could not answer the purpose of money, and there is no evidence of such act."

Furthermore, with respect to the check in issue, there was no privity of contract between Davis and Courtney out of which the alleged fraud arose. The check was from Courtney to the Mining Company; Davis had nothing to do with it. In addition, the alleged fraud did not arise out of the

check, but out of discussions concerning the mortgage.

4 Am. Jur. p. 511—Sec. 21—Assumpsit.

Furthermore, we cannot see how the appellant could accept further consideration in the form of stock in the Mining Company or at least fail to offer to return it, and still argue that he has the right of rescission. The two courses of conduct are incompatible.

And finally, this cannot be an action for rescission, because appellees were not parties to the contract which appellant is seeking to rescind. The contract by virtue of which appellant gave up a check for \$10,000.00 was between Courtney and the Mining Company, not between Courtney and Davis, or Courtney and the Bank. We cannot see how one can base his action on an invalid contract and then collect for money had and received as the result of another distinct contract.

Therefore, the Appellant has no cause of action for money had and received. Nor can it be said to have affirmed the contract and be seeking damages for an alleged fraud, since he has stated that his cause of action is for rescission, he must stand by it, since he has made an election, therefore his case falls at this point. Even if this were not so, there is no evidence that the appellant has been damaged. The Trial Judge refused to permit witnesses Courtney and Haygood to testify as to the value of the machinery at the mine. He was on solid ground in excluding this evidence. Firstly, since the alleged theory of action was one of rescission, the value of the

machinery was irrelevant. Secondly, neither Courtney nor Haygood were qualified as experts to testify. Appellant's own citation bears us out on this point. The Washington case from which he quotes represents a minority view.

The Appellant in specification of errors Nos. 3 and 4, (p. 7 Appellant's Brief) predicated error owing to the fact that the Court did not permit Courtney and Haygood to testify as to the value of the property: Courtney, the Appellant, had had no experience with mine machinery; his sole experience being that of some instruments to make recordings, or phonograph records. He was not a trained miner, nor had he handled mining machinery, nor did he have the know-how of mining machinery.

Witness Haygood became president of the corporation some time prior to the transaction, but he had no part, at least as far as the records show, in purchasing the machinery; he was not a miner; he was not a dealer in mining machinery; in fact, the record is silent as to him being qualified in any particular. The Appellant takes the position as to Haygood that the fact he was president of the company, qualified him to testify. We do not understand the rule to be such.

The Appellant has cited numerous cases and we will discuss a few of them briefly.

The first case is *Weber v. West Seattle Land & Improvement Co.* (Washington) 63 P. (2d) 418 and in this case the Court held that it was settled at law in the State of Washington that the owner of property may testify as to

its value on the assumption that he is so familiar with the property and its uses as to know its worth. The Court cites the case of *Wicklund vs. Allraum, et ux* 211 Pac. Rep. 760, and in this case the court was discussing the right of an individual owner, and not an officer of the corporation, to testify as to its value or to give an estimate of its value, and the property under discussion was property in common use.

The next case is *Travelers Indemnity Company v. Plymouth Box Panel Company* (Circ. Ct. of Appeals, 4th Circ) 9 Fed. 218, and in this case the court held that a President of a corporate owner, who was shown to have been familiar with the particular machine in operation for several years, should be permitted to testify as to the sound value of the machine before the accident. Such was not the case in the instant matter. Haygood was anything but familiar with the property in question and there is no evidence to show that he was familiar with its use; whether it was a complete workable unit, or whether it was a piece of mining machinery that might be used or might not be used.

The next case is that of *Appeal of Dubuque-Wisconsin Bridge Co., (Iowa)* 25 NW (2d) 327, and in this case the Court held:—

“Ordinarily the owner of property is deemed qualified by reason of his ownership to express an opinion as to the value of his property for purposes of determining its value for taxation, but the officer of a private corporation which owns the property, unless he is a managing officer, is not thereby qualified

to testify as to its value but it must be further shown that he has knowledge of such value as qualifies him in fact."

The next case is *Dallas Railway & Terminal Co., v. Strickland Transportation Co.* (Texas) 225 S.W. (2d) 901, and in this case the court held as follows:

"In suit for damages to refrigerator semitrailer resulting from a collision, plaintiff's president who had been engaged in the business of common carriage of freight by motor vehicle for 27 years and who during that time became familiar with value of refrigerator trailers because his company bought and sold such trailers, although not an expert witness, was qualified to testify concerning the value of the trailer immediately before and after the collision."

The next case referred to is *Hellstrom v. First Guaranty Bank*, (N.D.) 209 NW 212, 45 ALR 1487, and in this case on page 1495, the matter is stated thusly:

"The Court holds that a corporate officer is competent to testify to the value of realty belonging to the corporation where, by reason of his management of its affairs, his personal knowledge of the property, and his information as to surrounding values, he is qualified in fact."

And it appears in this case the president had for a great number of years, seven to eight years, had been in actual

controlling management of the affairs of the corporation and that he had had about 10 years experience in appraising farm lands and making real loans and had personal charge of Hellstrom's transactions and was appraiser for the Investors Mortgage Company. Hence, the rule as laid down in this case does not assist the Appellant.

The Appellant quotes from the Travelers Indemnity Company v. Plymouth Box Panel Company, *Supra*, and we note from the annotation that the case of Barrett v. Fournial 21 F. (2d) 298 is referred to and a reading of this case discloses that a court was passing on the right of an expert to testify as to the value of rugs, antiques, etc. and the facts were that the defendant had destroyed the property and that was the best evidence obtainable and the court stated the matter thusly:

"To hold that under such circumstances expert testimony as to value is incompetent would preclude proof of the damage caused by the defendant's wrongful act."

The next case referred to in the quoted section is Chicago and E. R. Co. v. Ohio City Lumber Company, 214 F. 751, and in that case the Court was passing on the right of an expert witness to testify and it appeared that the particular witness had been connected with the lumber business in various capacities for twenty years, and for four and one-half years had been Director, Secretary and Manager of the plaintiff's lumber company during which time he had sole charge of the business, made all purchases and sales, and

keeping the books, and he knew the value of lumber company stock and buildings.

The next case being *Union Pacific R. Co., v. Lucas*, 136 F. 374, and in this case we find the court was passing on the right of an individual owner who had personally purchased the property and who had used the property, to testify. The case referred to real estate.

Appellant refers also to the note 5 A.L.R. 1171, and a reading of the first paragraph of said annotation discloses the following:

“It seems that the rule which permits an owner of property to testify as to its value does not include the officers of the corporation, either public or private.

In fact we find all the cases referred to in the A. L. R. annotations holding otherwise than as stated by the Appellant. One of the cases referred to in the notes is that of the *Omaha Beverage Company vs. Temp Brewing Company*, 171 N. W. 704 wherein it was held that the evidence was admitted on the ground that the witness had special knowledge as to the value of certain cereals which composed the beverage, hence, he was permitted to testify, not because he was president of the company, but because he had special knowledge.

One must bear in mind that the Mining Company was a stock-selling concern, perhaps promotional only, for its property, and there was no qualification shown by either of the

two witnesses as to having any knowledge of the type, condition, or usability of the property in question, nor did they know whether it was a working unit, or whether it could be used for the type of ore they intended to mine, or whether other machinery must of a necessity be purchased to make it a workable unit.

In *Omaha Loan & Trust Co. v. Douglas County*, 86 N. W. 936, the plaintiff corporation attempted to prove by its president the value of land alleged to be damaged by the regrading of a street. The proposed testimony was excluded on the ground that the witness had not shown himself qualified to testify as to its value, the court saying:

“It is claimed that he should be treated as the owner of the property and presumed to know its value, because he is the president of the corporation purchasing it at the foreclosure sale. He, as the president of the company, is not the owner of property belonging to the corporation in the sense of the word when applied to the individual owner. An Officer of a corporation may have no greater personal knowledge of the value of its property than an entire stranger. The question would depend on the nature of his duties in relation to the corporation and his means of acquiring knowledge of the value of the property inquired about. In

this case there is no presumption in his favor, as in the case of an individual owning property, and nothing to show that the witness' knowledge was such as qualified him to testify as to the value because of values generally in that vicinity—The relation of the witness to

the property does not bring him within the rule of qualification to testify to the value of the land, as the owner."

At 45 A. L. R. 1494 it is said:

"The court (in the reported case) holds that a corporate officer is competent to testify to the value of realty belonging to the corporation, where, by reason of his management of its affairs, his personal knowledge of the property, and his information as to surrounding values, he is qualified in fact."

There was no evidence in the case to qualify Courtney as an expert, capable of estimating the value of the specialized type of equipment in issue at that particular time. Courtney knew nothing of the value of similar equipment in that area. Likewise, no showing was made as to Courtney having knowledge of what type of machinery was usable for the particular type of mining then in vogue in that mining district, the condition of the machinery, and also whether it was a complete unit and ready for use, its availability in the condition it was in, to perform the work necessary to be done in that mining district.

Likewise, Haygood was not shown to be qualified under the rules stated in the cited passages above. He testified that he was only somewhat familiar with the mining property. There was no evidence that he was qualified to give the value of such specialized equipment at that specific time, or that he was familiar with the value of similar equipment in that

area, or of the condition of the machinery. His chief qualifications seemed to be the fact that he was President of the Mining Company and, under the decisions above cited, that is not sufficient.

Consequently, the Trial Judge was correct in sustaining objections to the testimony of Courtney and Haygood. Furthermore, since no evidence of damage was adduced, if this is an action for damages, it must fail. Nor is there any evidence that the appellant foreclosed on his mortgage and exhausted his security to determine whether or not he was injured. This, it seems to us, would be necessary in an action for damages.

The appellant, in discussing the specification of error relating to fraud, refers to certain legal principles and draws certain conclusions, which conclusions, of course, we cannot agree with. In the first instance the appellant refers to the case of Fox, executor, vs. Cosgriff et al, 64 Idaho 448, 133 P. (2d) 930, and relies upon the position as taken by the Court in such case as authority for the position as taken by the appellant in its pleadings, but a reading of this case will disclose that they were dealing with an entirely different set of facts. The persons that were acting therein were a majority of the shareholders of a bank and the fraud alleged was one that they specifically participated in, and it might not be amiss to mention the fact that the action was one between a minority stockholders and the stockholders holding a majority of the stock, and it was one where the vendor sued his agent, which might, for all intents and purposes, be termed a vendee.

The next case is that of Kemmerer-Miles vs. Pollard,

15 Idaho 34, 96 P. 206, and is one for wrongful misrepresentations and breach of warranty.

Appellant appears to rely principally upon the rule announced in the case of *Bardach vs. Chain Bakers, Inc.*, 37 N. Y. Supp. (2d) 584, and we commend a reading of this case to the Court. A reading of this case discloses that Serman was appointed escrowee and that he violated many of the terms of the escrow agreement. The Court put the matter thusly:

“Sherman immediately resumed making unauthorized payments of the escrow money.”

And then again:

“While Sherman admitted violating the escrow agreement * * *.”

In this case Sherman acted affirmatively, making many misrepresentations which he knew to be false. In other words, his false actions lead up to the making of the sale which caused papers to be placed in escrow, while in the instant action the loan had been agreed upon and the parties came into the bank for the purpose of consummating the loan. There was nothing said by Davis that caused Courtney, the appellant, to enter into negotiations for the loan, or in finally agreeing to make the loan, those things had all been agreed upon between the parties so in no manner or in nowise did Davis affirmatively do anything that caused Courtney to make a loan that he would not have otherwise made. Davis

was a mere drafter of certain papers, he owed no duty to Courtney at the time the papers were drafted and if he ever did owe any duty to Courtney it was only after the escrow had been completed, signed and the papers deposited, and then only to carry out terms of escrow. Neither Davis nor the bank violated any terms of the escrow agreement.

Appellant quotes extensively from 24 American Jurisprudence, pages 8, 9 and 25, and, as we read page 8 the principles laid down therein refer to the fraud in procuring a contract to be entered into, while the authorities referred to on page 9 refer to a choice of course or conduct, and as we read the cases referred to, discussing the correct rules to be applied by the vendor and vendee, the authorities on page 25 refer to the action of *assumpsit*, that is, an action on an implied contract, and in these cases the courts generally were dealing with contracts where the same were entered into by reason of the fraud practiced, that is, where one person has been fraudulently induced to enter into a contract, and we have no quarrel with the principles laid down, but, of course, the facts in the instant case are so different than they were in the various cases discussed by the author of the work that we think the same is not in anywise applicable.

The next authority cited by appellant is that of *Restatement of the Law—Trusts*, page 7, sub-paragraph B, and this is dealing strictly where a person is in a fiduciary relation to another, and as we understand it such relationship does not exist in the instant action. If a fiduciary relationship existed it existed both as to the mining company and

to the appellant Courtney, and the only obligation then was to see that the terms of the escrow were carried out, there was nothing in the escrow agreement as to who was drafting the mortgage, and, as we understand it, neither Davis nor the bank violated any of the terms of the escrow agreement, and again let us repeat that Davis merely stood in the relationship of a person drafting a mortgage and if an escrowee stands in the position of fiduciary none existed at the time the mortgage was drafted.

The next authority referred to is Restatement of the Law-Torts, page 432, section 874, and we find the matter stated thusly:

“A person standing in a fiduciary relation with another is liable to the other for harm resulting from a breach of duty imposed by such relation.”

Then we find the author stating the matter this way:

“A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation
* * *”

“The local rules of procedure, the type of relation between the parties and the intricacy of the transaction involved, determine whether the beneficiary is entitled to redress at law or in equity.”

We find nothing in these authorities that is applicable

to the parties in the instant case. The most that can be said of the bank was that it was an escrow holder and the terms of the escrow determined the rights of each party.

An escrow does not arise until there is an actual contract between the parties, and interest and a proper subject matter and an absolute deposit of an instrument with the depository acting for the parties by which it passes beyond the control of the depositor to withdraw the deposit on the performance or happening of the agreed conditions of the escrow, and again, an escrow is generally defined as a conditional delivery of an instrument to a stranger to be kept by him until certain conditions are performed, and then to deliver according to the terms of the escrow.

These statements are supported by Words and Phrases, Volume 15, page 229 (Escrow) and as we understand it an escrow creates a limited agency and the holder of the escrow must comply with the terms thereof, and we submit in the instant matter that the facts as shown by the record in no wise creates a relationship that would cause the appellees to respond in damages, and we likewise submit that there was no violation shown of any terms of any escrow.

Furthermore, there is no evidence of fraud in this case, and since fraud is its foundation and sine qua non, no matter what may be the theory of action, the appellant has failed to make out a prima facie case under any theory. There is certainly no evidence of actual fraud. Testimony as to whether or not Courtney instructed Davis to include in the mortgage from the Mining Company to Courtney the same equipment

as was in the mortgage from the Mining Company to the Bank is in conflict. A mortgage on property not owned by mortgagor is of no value, hence in instant matter a mortgage on the identical property covered by bank's mortgage would not have assisted Appellant Courtney. And then Davis may have understood that Courtney was referring to the property actually owned that was listed in the mortgage. If Davis had included in the mortgage, property not owned by the Mining Company, that would have been fraud in its purest sense.

The bank had no mortgage on the property covered by the Bassett mortgage and Courtney does not say he told Davis to include the property so mortgaged to Bassett, although he complains of that fact in his complaint. If there were no such instructions, there was no fraud. Appellant, assuming that there were such instructions, argues that, in view of the escrow agreement, a fiduciary relationship existed between the appellant and the appellees, and that the appellees had a duty to reveal any knowledge appellees may have had of the former mortgage, and that their failure to reveal constituted fraudulent concealment. It should be observed at this point that the Bardach case cited by Appellant to support his position involves an affirmative misrepresentation, rather than a concealment, and thus is not applicable. A reading of the facts of the case will reveal the extent to which it differs from the case at bar.

The fallacy in appellant's argument is that he does not realize that an escrow holder is a special type of agent ,or

fiduciary, who cannot because of his peculiar position, be bound to reveal certain information under certain circumstances. It is a limited agency. The California Court said, in the case of *Blackburn v. McCoy*, 37 P (2) 153:

“There seems to be a divergence of opinion in the books as to whether the status of an escrow holder is that of an agent or trustee for the parties to the escrow. Conceding that the escrow instructions created an agency in the defendant Title Guarantee & Trust Company for the several parties to the escrow, as contended for by appellant Blackburn, it could not be a general agency for each one of the parties because their interests were conflicting. The status could only properly be classified as an agency on the theory there was a limited agency as to each party to the escrow, whereby the duties and obligations owing by the escrow holder to each would not conflict with the duties it owed to the others. The usual purpose that prompts the creation of an escrow is the desire of persons dealing at arm's length with each other to have their conflicting interests handled by one person in such a manner as to adequately protect the rights of each of the parties to the transaction. The fundamental principles underlying the obligations of a general agency would not, and could not, tolerate the operation of an escrow, such as we have here, as a general agency. If the several escrow instructions create in the escrow holder an agency, it must be one limiting the obligations of the escrow holder to each party to the escrow in accordance with the instructions given by such party. This in practice has been and is the un-

derlying principle that has made possible the development of the escrow method of handling transactions which has become such an important factor in conveyancing and other business activities. Upon this theory, it has been given almost universal judicial sanction in this and other jurisdictions."

Thus, in the case at bar, the appellee was under a duty not to reveal any information of the prior mortgage to the appellant because, as the escrow holder, he owed to the other party to the escrow, the Mining Company, the duty not to divulge that information. Because of this prohibition, he could not be held to have fraudulently concealed the information.

Furthermore, we might argue on this point of fraudulent concealment that an agent has no duty to communicate to his principal any knowledge which he has concerning the agency coming to his knowledge before entering the employment.

Taylor v. Yorkshire Insurance Company
Limited,

2 Ir. R. 1, Ann. Cas. 1913 E. 807.

And it has also been held that where an agent is acting in a mere ministerial capacity (as in the case at bar), there is no duty imposed on him of communicating to his principal the knowledge acquired in such capacity.

Royle Min. Co. v. Fidelity & Casualty Co.,
142 S. W. 438.

It is obvious, therefore, that there is no evidence of fraud in the case at bar.

To sum up, we respectfully submit that upon the evidence adduced at the trial, the appellant failed to prove a prima facie case and that the ruling in excluding certain testimony did not constitute reversible error, and that the judgment heretofore rendered should be affirmed.

Respectfully submitted,

O. R. BAUM

RUBY Y. BROWN

Attorneys for Appellees.

No. 13088

United States
Court of Appeals
For the Ninth Circuit.

DONALD McKITTRICK and BARBARA Mc-
KITTRICK,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

DEC 12 1951

PAUL P. O'BRIEN

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

CLERK

No. 13088

United States
Court of Appeals
For the Ninth Circuit.

DONALD McKITTRICK and BARBARA Mc-
KITTRICK,

Appellants,

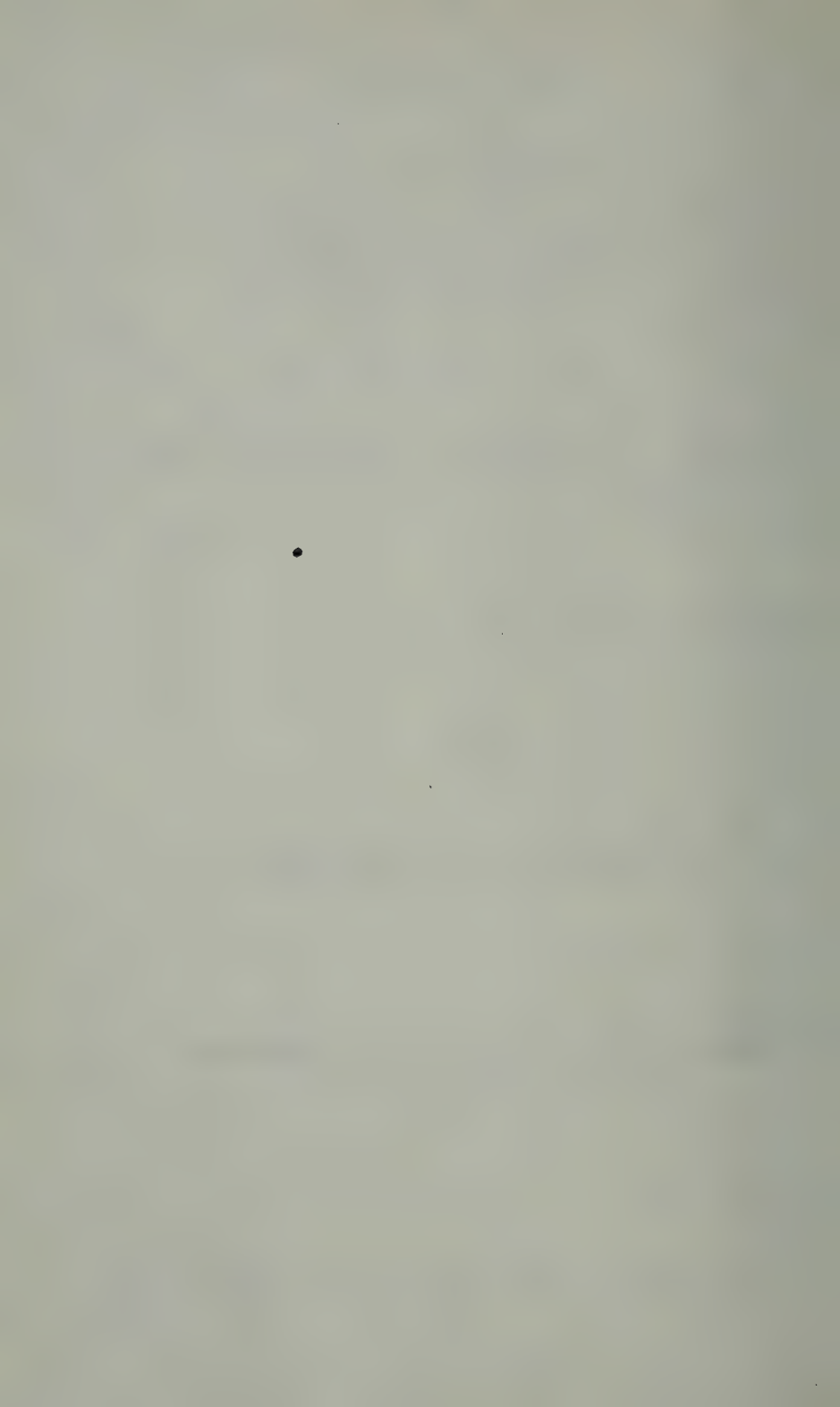
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NAMES AND ADDRESSES OF ATTORNEYS

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United States District Court for the Northern
District of California, Southern Division

No. 29940

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DONALD McKITTRICK and BARBARA McKIT-
TRICK,

Defendants.

COMPLAINT FOR INJUNCTION,
RESTITUTION AND TREBLE DAMAGES

Count I.

1. In the judgment of the Housing Expediter, the defendants have engaged in acts and practices which constitute violations of Section 4 of the Emergency Price Control Act of 1942, as amended (50 U.S.C.A. Appendix Section 904).

2. Jurisdiction of this action is conferred upon this Court by Sections 1(b), 205(a) and 205(c) of said Emergency Price Control Act of 1942, as amended.

3. At all times mentioned herein defendants were the landlords of and rented certain controlled housing accommodations located within the Alameda County Defense-Rental Area, described as 111 Oakmont Avenue, Piedmont, California.

4. Prior to July 1, 1947, there has been in full force and effect pursuant to said Emergency Price Control Act of 1942, as amended, the Rent Regulations issued pursuant to said Act, establishing a maximum rental for the use and occupancy of housing and rental accommodations within the defense-rental area in which the premises referred to in paragraph 3 of Count I above are located.

5. Prior to July 1, 1947, defendants demanded, accepted or received from tenant occupying the premises described in Paragraph 3 of Count I above, rentals in excess of the lawful rental permitted by said Rent Regulations, as appears more fully in Item I of Schedule marked Exhibit "A" attached hereto and by reference incorporated herein.

6. Prior to July 1, 1947, defendants demanded, accepted or received as rent for other terms of occupancy or from other tenants or for other premises, rentals in excess of the lawful maximum permitted by said Rent Regulations, the terms of which occupancy or the names of which tenants or the premises involved being presently unknown to the Plaintiff.

Count II.

1. Plaintiff incorporates herein by reference the allegations in Paragraph 3 of Count I of his Complaint herein.

2. In the judgment of the Housing Expediter, the defendants have engaged in acts and practices

which constitute violation of Section 206(a) of the Housing and Rent Act of 1947, as amended (50 U.S.C.A. App. 1881-1906; Public Law 31, 81st Congress, 1st Session).

3. Jurisdiction of this action is conferred upon this Court by Sections 206(b) and 206(c) of said Housing and Rent Act of 1947, as amended.

4. Since July 1, 1947, there has been in full force and effect pursuant to said Housing and Rent Act of 1947, as amended, the Rent Regulations issued pursuant to said Act, establishing a maximum rental for the use and occupancy of housing and rental accommodations within the defense-rental area in which the premises referred to in Paragraph 3 of Count I above are located.

5. Since July 1, 1947, defendants demanded, accepted or received from tenant occupying the premises described in Paragraph 3 of Count I above, rentals in excess of the lawful rental permitted by said Rent Regulations, as appears more fully in Item 2 of Schedule marked Exhibit "A" attached hereto and by reference incorporated herein.

6. Since July 1, 1947, defendants demanded, accepted or received as rent for other terms of occupancy or from other tenants or for other premises rentals in excess of the lawful maximum permitted by said Rent Regulations, the terms of which occupancy or the names of which tenants or the premises involved being presently unknown to the Plaintiff.

Count III.

1. Plaintiff incorporates herein by reference the allegations in Paragraph 3 of Count I and Paragraph 4 of Count II of his Complaint herein.

2. Jurisdiction of this action is conferred upon this Court by Sections 205 and 206(c) of said Housing and Rent Act of 1947, as amended.

3. Since July 1, 1947, and within one (1) year prior to the date of the commencement of this action (exclusive of the thirty (30) day period immediately prior to the date of the commencement of this action) to wit: between August 13, 1949, and November 13, 1949, defendants demanded, accepted or received from tenant occupying the premises described in Paragraph 3 of Count I above, rentals in excess of the lawful rental permitted by said Rent Regulations as appears more fully in Item 3 of Schedule marked Exhibit "A" attached hereto and by reference incorporated herein.

4. Since July 1, 1947, and within one (1) year prior to the date of the commencement of this action (exclusive of the thirty (30) day period immediately prior to the date of the commencement of this action) defendants demanded, accepted or received as rent for other terms of occupancy or from other tenants or for other premises rentals in excess of the lawful maximum permitted by said Rent Regulations, the terms of which occupancy or the names of which tenants or the premises involved being presently unknown to the Plaintiff.

5. More than thirty (30) days have elapsed since the occurrence of the violations hereinabove mentioned, and the persons from whom such excess rental payments were demanded, accepted or received have not instituted any action under Section 205 of the Housing and Rent Act of 1947, as amended for said violations.

Wherefore, the Plaintiff demands and prays:

1. That an injunction be issued enjoining the defendants, their agents, attorneys, servants, employees, and all other persons in active concert or participation with the defendant from directly or indirectly demanding, accepting or receiving rents in excess of the maximum rents established by any Regulation or Order heretofore or hereafter adopted, pursuant to the Housing and Rent Act of 1947, as heretofore or hereafter amended, or extended, or superseded, or from engaging in any acts and practices which constitute or will constitute a violation of any of the provisions of the Housing and Rent Act of 1947, as amended, or extended, or superseded, or of the Rent Regulations issued pursuant thereto.

2. That the defendant be ordered and directed to pay to the Treasurer of the United States, for and on behalf of all persons entitled thereto, a refund of all amounts (the amount presently ascertained by the Plaintiff being the sum of One Thousand Dollars (\$1,000.00) in excess of the lawful maximum rents which have been or may be de-

manded, accepted or received by the defendants from any tenants for or in connection with the use or occupancy of the housing accommodations hereinbefore mentioned; or, in the alternative, that the defendants be ordered and directed to pay the amounts in excess of the lawful rents as hereinabove prayed, to the Treasurer of the United States.

3. That judgment for the Plaintiff be granted herein for Two Hundred Twenty-five Dollars (\$225.00), being three times the amount by which the rents demanded, accepted or received by defendants within one year prior to the date of the commencement of this action, (excluding, however, the 30 days immediately prior to the date of the commencement of this action) exceeded the legal maximum rent.

4. That such other, different or further relief to which Plaintiff may be entitled be granted, or other relief be accorded which the Court may find necessary to effectuate the purposes of the said Act as now existing, or as hereafter amended or superseded, and of any orders or regulations issued thereunder.

5. That Plaintiff recover the costs of this action.

Dated this 31st day of August, 1950.

/s/ RAYMOND J. FOX,

Litigation Attorney, Office of
Housing Expediter.

EXHIBIT A

SCHEDULE

Donald and Barbara McKittrick
P.O. Box 39, Walnut Creek, California

| Tenant | Unit | Date Rented | Rent Collected | Maximum Legal Rent | Number of Overcharges | Amount of Each Overcharge | Amt. Subject Overcharge to Each Tenant to Treble Damages |
|-----------------|---|------------------------|---|-----------------------|--------------------------|---------------------------------|--|
| Item 1 | | | | | | | |
| Bruce A. Wilson | House 111 Oakmont Ave. Piedmont, Calif. | 7-13-46 | Cash bonus paid in advance as condition prior to rental of apartment. | | | | \$300.00 |
| Item 2 | | | | | | | |
| Bruce A. Wilson | House 111 Oakmont Ave. Piedmont, Calif. | 7-14-47 to 11-13-49 | | \$110.00 per mo. | 28 | \$25.00 | \$700.00 |
| Item 3 | | | | | | | |
| Bruce A. Wilson | House 111 Oakmont Ave. Piedmont, Calif. | 8-13-49 to 11-13-49 | | \$110.00 per mo. | 3 | \$25.00 | \$75.00 |

[Endorsed]: Filed August 3, 1950.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS DONALD McKIT-
TRICK AND BARBARA McKITTRICK

Come now the defendants, Donald McKittrick and Barbara McKittrick, and answering the complaint on file herein, admit, deny and allege:

1. By way of a first and separate
answer to Count I.

I.

Answering paragraph 1, deny that these defendants, or either of them, have engaged in acts or practices which constitute or constituted violations of Section 4 of the Emergency Price Control Act of 1942 as amended, or otherwise.

II.

Answering paragraph 3, admit that these defendants were landlords and rented the housing accommodations described in said paragraph, but deny that at any time therein mentioned said housing accommodations were subject to any valid rent control order fixing a maximum rent for said housing accommodations less than \$135.00 per month.

III.

Answering paragraph 5, deny that prior to July 1, 1947, these defendants, or either of them, demanded, accepted or received from anyone any rentals in excess of any lawful rental permitted by any valid Rent Regulations.

IV.

Answering paragraph 6, these defendants deny, each and every, all and singular, generally and specifically, the allegations in said paragraph contained.

Wherefore, these defendants pray judgment.

2. As and for a second and separate
defense to Count I.

I.

Allege that more than one year elapsed between the 1st day of July, 1947, and the filing of this action on August 3, 1950.

Wherefore these defendants pray judgment.

3. As and for a third and separate
defense to Count I.

I.

Allege that on July 1, 1947, by virtue of the terms of the statute theretofore in effect, and further by virtue of Section 205 of the Housing and Rent Act of 1947, the Emergency Price Control Act of 1942, as the same was in force prior to July 1, 1947, ceased to exist, and all rights thereunder ceased to exist, and by virtue of Section 205 of the Housing and Rent Act of 1947 plaintiff had no cause of action, and lost any cause of action previously held, by reason of the circumstances set forth in said Count I.

Wherefore these defendants pray judgment.

4. As and for a first and separate
answer to Count II.

I.

Answering paragraph 3 of the first Count as it is incorporated by reference in paragraph 1. of the second Count, admit that these defendants were landlords and rented the housing accommodations described in said paragraph, but deny that at any time therein mentioned said housing accommodations were subject to any valid rent control order fixing a maximum rent for said housing accommodations less than \$135.00 per month.

II.

Answering paragraph 2, deny that these defendants or either of them have engaged in acts or practices which constitute or constituted violations of Section 4 of the Emergency Price Control Act of 1942 as amended, or otherwise.

III.

Answering paragraph 5, deny that since July 1, 1947, these defendants, or either of them, demanded, accepted or received from anyone any rentals in excess of any lawful rental permitted by any valid Rent Regulations.

IV.

Answering paragraph 6, these defendants deny, each and every, all and singular, generally and specifically, the allegations in said paragraph contained.

Wherefore these defendants pray judgment.

5. As and for a second and separate
answer to Count II.

I.

Allege that more than one year elapsed after the making of any rent payments made prior to August 2, 1949, and the filing of this action on August 3, 1950.

Wherefore these defendants pray judgment.

6. As and for a third and separate
defense to Count II.

I.

Allege that from July 1, 1947, and until April 1, 1949, there was in full force and effect Section 205 of the Housing and Rent Act of 1947, and that by virtue of that Section, and at all times from July 1, 1947, and until April 1, 1949, plaintiff had no cause of action by reason of the circumstances set forth in Count II and that no cause of action was created retroactively by reason of the provisions of Section 205 of the Housing and Rent Act of 1949.

Wherefore these defendants pray judgment.

7. As and for a first and separate
answer to Count III.

I.

Answering paragraph 3 of Count I as the same is incorporated by reference in paragraph I of Count III, admit that these defendants were landlords and rented the housing accommodations de-

scribed in said paragraph, but deny that at any time therein mentioned said housing accommodations were subject to any valid rent control order fixing a maximum rent for said housing accommodations less than \$135.00 per month.

II.

Answering paragraph 3, deny that between August 13, 1949, and November 13, 1949, these defendants or either of them demanded or accepted or received from anyone any rentals in excess of any lawful rental permitted by any valid rent regulations.

III.

Answering paragraph 4, deny, each and every, all and singular, generally and specifically, the allegations in said paragraph contained.

IV.

Answering paragraph 5, allege that between July 13, 1946, and November 13, 1949, the tenant of the premises described in said Count III did wilful and wanton damage to the said premises, and the furniture and furnishings therein, and that the said damage so done exceeds the sum of \$1225, and that the cause of action set forth in said Count III, if any ever existed, has been paid and discharged by defendants in full by reason of offset because of said damage and the forbearance of defendants to sue therefor, and was so paid and discharged within 30 days after said cause, if any, in favor of said tenant, arose.

Wherefore defendants and each of them pray that plaintiff recover nothing by this action and that defendants and each of them go hence dismissed.

/s/ FRANCIS T. CORNISH,
Attorney for Defendants, Donald McKittrick and
Barbara McKittrick.

[Endorsed]: Filed August 25, 1950.

[Title of District Court and Cause.]

PLAINTIFF'S REQUEST FOR ADMISSIONS

To Francis T. Cornish, Attorney at Law, American
Trust Building, Berkeley 4, California.

For the purpose of this action only, pursuant to the provisions of Rule 36, as amended, of the Federal Rules of Civil Procedure, and within ten days after service of this Request, Plaintiff requests the Defendants to admit the genuineness of the documents described and exhibited herewith, if any, and to admit the truth of the following relevant matters of fact.

1. That at all times material to this action Defendants were the landlords of certain controlled housing accommodations, more particularly described and set forth in Exhibit A attached to Plaintiff's Complaint, which schedule is by reference incorporated herein.

2. That the items in said schedule truthfully and correctly designate the names of the tenants who

occupied the designated housing accommodations.

3. That the items in said schedule truthfully and correctly designate the periods said tenants occupied said accommodations.

4. That the items in said Exhibit A truthfully and correctly designate the rentals collected from said tenants.

5. That said schedule truthfully and correctly designates the registered legal rents in force for the indicated housing accommodations for the periods of time referred to in request No. 3.

6. That more than 30 days have elapsed since the date of the alleged overcharges and the tenants named in the aforementioned schedule have not filed suit against Defendants herein to recover said overcharges.

Dated this 20th day of September, 1950.

/s/ REUEL K. YOUNT,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 22, 1950.

[Title of District Court and Cause.]

REPLY TO REQUESTS FOR ADMISSION OF FACTS

Come now the defendants and make the following answer to the requests for admissions of fact dated September 20, 1950, and made by plaintiff

pursuant to Rule 36 of the Federal Rules of Civil Procedure.

Request No. 1

Defendants admit that they were, from July 13, 1946, until November 13, 1949, both dates inclusive, the owners of the real property consisting of a house and lot commonly known and designated as 111 Oakmont Avenue, Piedmont, California, but do not admit the legal conclusions set forth in said forth in said request for admission of facts.

Request No. 2

Defendants admit that from July 13, 1946, to November 11, 1949, both dates inclusive, Bruce A. Wilson was in possession of the real property consisting of a house and lot commonly known and designated as 111 Oakmont Avenue, Piedmont, California, but do not admit the legal conclusions set forth in said request for admissions of facts.

Request No. 3

Defendants admit the facts as set forth in their answer to request for admission No. 2, but do not admit the legal conclusions set forth in said request for admission of facts.

Request No. 4

Defendants do not admit that Exhibit A attached to the complaint correctly sets forth all the money paid by Bruce A. Wilson to defendants from July 13, 1946, until November 13, 1949, both dates in-

clusive, nor do defendants admit the legal conclusions set forth in said request for admission of facts.

Request No. 5

Defendants do not admit that Exhibit A attached to the complaint truthfully or correctly or fully depicts the financial transactions between Bruce A. Wilson and these defendants, and defendants do not admit the legal conclusions set forth in said request for admission of facts.

Request No. 6

Defendants admit that more than 30 days elapsed between November 13, 1949, and August 30, 1950, and admit that neither defendant has been personally served with summons or complaint in any action brought against defendants or either of them by Bruce A. Wilson. Defendants have been unable to investigate the records of all of the courts in which such action could have been filed, and therefore except as herein expressly admitted, do not admit that Bruce A. Wilson has not filed an action against defendants, and defendants do not admit the legal conclusions set forth in said request for admission of facts.

Dated September 22, 1950.

/s/ FRANCIS T. CORNISH,
Attorney for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 23, 1950.

[Title of District Court and Cause.]

PLAINTIFF'S INTERROGATORIES

To Francis T. Cornish, Attorney at Law, American Trust Building, Berkeley 4, California.

Pursuant to the provisions of Rule 33 of the Federal Rules of Civil Procedure, as amended, Plaintiff addresses to the Defendants herein the following interrogatories to be answered separately, fully, and under oath within 15 days:

1. Since Defendants admit that for the period from July 13, 1946, until November 13, 1949, they were the owners of certain real property consisting of a house and lot commonly known and designated as 111 Oakmont Avenue, Piedmont, California, state whether or not Defendants rented said property during said period of time.

2. Since Defendants admit that during the period referred to in Interrogatory No. 1 relative to said house and lot mentioned in Interrogatory No. 1, that one Bruce A. Wilson was in possession of said premises during said period, state the terms and conditions of the occupancy of said Wilson of said premises.

3. Is it not a fact that said Wilson rented said premises from the Defendants herein?

4. State whether a rental agreement was made with said Wilson by Donald McKittrick or Barbara McKittrick or both.

5. Is it not a fact that on or about July 13,

1946, the Defendants or one of them demanded and received of said Bruce A. Wilson the sum of \$300.00?

6. Is it not a fact that said sum was paid by check by the said Wilson?

7. Is it not a fact that the Defendants or one of them cashed said check and retained said monies?

8. Is it not a fact that the demand and receipt of said sum paid by said Wilson was in the nature of a bonus for renting the aforementioned housing accommodations?

9. If the answer to the last Interrogatory above is in the negative, state the reason Bruce A. Wilson paid said sum of \$300.00 to the Defendants herein.

10. Is it not a fact that on or about July 13, 1946, the Defendants or one of them entered into a rental agreement for said premises with the said Wilson at a rental of \$110.00 per month?

11. Is it not a fact that the Defendants or one of them agreed to rent said premises to the said Wilson at a monthly rental of \$110.00 per month?

12. Is it not true that for the period beginning on or about July 13, 1946, and ending on or about July 13, 1947, the Defendants or one of them did receive for each and every month of said period monthly rentals in the amount of \$110.00 per month?

13. Is it not true that for each and every month of said period said sum of \$110.00 per month was paid to Defendants herein by the said Wilson by check?

14. Is it not true that on or about July 13, 1947, the Defendants or one of them notified the said Wilson that his monthly rental would be increased to the amount of \$135.00 per month?

15. Is it not true that for the period beginning on or about July 13, 1947, and ending on or about November 13, 1949, the Defendants did receive monthly rentals from the said Bruce A. Wilson in the amount of \$135.00 per month?

16. Is it not true that said rentals were paid to Defendants herein by said Wilson by check?

17. Is it not true that Defendants cashed or deposited said checks for their own personal use?

18. Since Defendants, in response to Plaintiff's Request No. 5 denies that Exhibit A attached to Plaintiff's Complaint "truthfully or correctly or fully depicts the financial transactions between Bruce A. Wilson and these defendants," state in detail the nature and extent of any and all financial transactions between the Defendants and Bruce A. Wilson that pertain to the use and occupancy of the aforementioned housing accommodations by the said Bruce A. Wilson?

Dated this 11th day of October, 1950.

/s/ REUEL K. YOUNT,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 12, 1950.

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES SERVED
BY MAIL OCTOBER 11, 1950

Interrogatory No. 1

Defendant, Barbara McKittrick, as lessor, leased said real property to Bruce A. Wilson and Barbara S. Wilson. Neither of these defendants was a lessee thereof during the period asked.

Interrogatory No. 2

Without desiring to express the opinion or conclusion of either of these defendants, they state that the terms and conditions varied from time to time. From July 13, 1946, to July 13, 1947, the terms and conditions were set forth in an agreement in writing, a copy of which is attached and marked Exhibit A. From July 13, 1947, to July 13, 1948, the terms and conditions were evidenced by a writing endorsed on Exhibit A and reading as follows:

“This lease is hereby renewed for the period from July 13, 1947, to July 13, 1948, on the same terms as above (signed) D. S. McKittrick, Barbara McKittrick, Bruce A. Wilson, Beatrice S. Wilson.”

On or about July 13, 1948, the same four signatories orally agreed to extend said lease for an additional period commencing July 13, 1948, and ending July 13, 1949. On or about July 13, 1949, the same four signatories orally agreed to extend said lease for whatever period events might later

require Bruce A. Wilson and Beatrice S. Wilson to prepare and move into a new house which they had then or were about to acquire.

Interrogatory No. 3

Has been answered by the answer to Interrogatory No. 2.

Interrogatory No. 4

Has been answered by the answer to Interrogatory No. 2.

Interrogatory No. 5

On or about July 13, 1946, defendants owned the house in question, and also owned a home in Walnut Creek, which last mentioned home was not subject to rental control. Defendants had been offered \$150.00 per month to rent the Walnut Creek home and had determined to rent the Walnut Creek home and live at 111 Oakmont Avenue, Piedmont. Under these circumstances Bruce A. Wilson and Beatrice S. Wilson, in order to induce these defendants to forego their right to occupy their own home at 111 Oakmont Avenue, Piedmont, for one year, and to occupy and not rent their home in Walnut Creek, and to permit Bruce A. Wilson and Beatrice S. Wilson to enter into possession of 111 Oakmont Avenue, Piedmont, but not as rent for 111 Oakmont Avenue, Bruce A. Wilson and Beatrice S. Wilson paid defendants the sum of \$300.00.

Interrogatory No. 6

Yes.

Interrogatory No. 7

Yes.

Interrogatory No. 8

No, the money was paid in consideration for these defendants foregoing for a period of one year their right to occupy their own home and to rent out another which they did for that reason occupy and for which they could have received a greater rent.

Interrogatory No. 9

Bruce A. Wilson and Beatrice S. Wilson paid said sum for the reason set forth in the answers to interrogatories Nos. 5 and 8.

Interrogatory No. 10

This has been answered by the answer to interrogatory No. 2.

Interrogatory No. 11

This has been answered by the answer to interrogatory No. 2.

Interrogatory No. 12

Yes.

Interrogatory No. 13

Defendants cannot recall positively the means by which each payment was made.

Interrogatory No. 14

No. Defendants notified Bruce A. Wilson and Beatrice S. Wilson prior to July 13, 1947, that defendants desired to move back into 111 Oakmont Avenue, Piedmont. Bruce A. Wilson and Beatrice

S. Wilson thereupon, in order to induce defendants to forego possession of their own house for another year and to occupy their Walnut Creek home and not rent it out for that period, Bruce A. Wilson and Beatrice S. Wilson offered to pay an additional sum of \$300.00. After defendants agreed to this, Bruce A. Wilson and Beatrice S. Wilson asked for permission to pay said sum of \$300.00 at the rate of \$25.00 per month. This was agreed to and the money was paid in that manner.

Interrogatory No. 15

No. From July 13, 1947, to July 13, 1948, Bruce A. Wilson and Beatrice S. Wilson paid \$110.00 per month rent and the sum of \$300.00 at the rate of \$25.00 per month as is set forth in the answer to interrogatory No. 14. On or about July 13, 1948, the four signatories mentioned in the answer to interrogatory No. 2 entered into the oral agreement to extend said lease as set forth in the answer to interrogatory No. 2 and also entered into an oral agreement that if defendants would forego their right to occupy their own home at 111 Oakmont Avenue, Piedmont, for another year and during that period occupy and not rent their Walnut Creek home at a larger rental, Bruce A. Wilson and Beatrice S. Wilson would pay defendants the sum of \$300.00 at the rate of \$25.00 per month. On or about July 13, 1949, the said four signatories entered into an oral agreement that if defendants would forego their right to occupy 111 Oakmont Avenue, Piedmont, until a certain home then being prepared for Bruce A. Wilson and Beatrice S.

Wilson was completed and ready for occupancy, said Wilsons would pay defendants' rent at the rate of \$110.00 per month and an additional sum of \$25.00 for foregoing defendants' right of occupancy of 111 Oakmont Avenue, Piedmont. All sums agreed to be paid were paid.

Interrogatory No. 16

Defendants cannot now positively recall the manner in which all of the payments were made.

Interrogatory No. 17

Defendants cashed and received the proceeds from all checks given to them by Bruce A. Wilson and/or Beatrice S. Wilson.

Interrogatory No. 18

Exhibit A attached to the Complaint fails to show rent of \$110.00 per month paid from July 13, 1946, to July 13, 1947. It also fails to distinguish between rent paid at \$110.00 per month and money paid to defendants to induce them not to exercise their right to occupy their own home and rent out their Walnut Creek home for a higher rental than could be received for 111 Oakmont Avenue, Piedmont. It also fails to record that when Bruce A. Wilson and Beatrice S. Wilson occupied 111 Oakmont Avenue, Piedmont, they allowed damage amounting to several hundred dollars to defendants' furniture to occur from moths, and upon vacating the premises they took with them pictures belonging to defendants and valued in excess of \$500.00.

/s/ DONALD McKITTRICK.

State of California,
County of Alameda—ss.

Donald McKittrick, being first duly sworn, deposes and says: That he has read the foregoing Answers to Interrogatories and they are true to the best of his knowledge and belief.

/s/ DONALD McKITTRICK.

Subscribed and sworn to before me this 26th day of October, 1950.

[Seal] /s/ FRANCES M. GUIDICI,
Notary Public in and for the County of Alameda,
State of California.

EXHIBIT A

Lease

This Indenture, Made and entered into at Walnut Creek, County of Contra Costa, State of California, this 13th day of July, 1946, By and Between Barbara McKittrick, the party of the first part, and Bruce A. Wilson and Beatrice S. Wilson, the parties of the second part,

Witnesseth: That for and in consideration of the payment of the rents and the performance of the covenants contained herein on the part of the said parties of the second part, and in the manner hereinafter stated, said party of the first part does hereby lease, demise and let unto the said parties of the second part that certain Dwelling House and its appurtenances located at 111 Oakmont Ave. in

the City of Piedmont, County of Alameda, State of California, and certain furnishings as per an inventory shown by the lessor and signed by the lessee and lessor and which is a part of this lease,

For the Term of One Year commencing on the 13th day of July (12 N), 1946, and ending on the 13th day of July (12 N), 1947, at the rent or sum of Thirteen hundred twenty 00/100 Dollars (\$1320.00) payable monthly in advance of the 15th day of each and every month of said term.

And It Is Hereby Agreed, that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter said premises and remove all persons therefrom.

And the Said parties of the second part do hereby promise and agree to pay to the said party of the first part the said thirteen hundred twenty dollars rent herein reserved in the manner herein specified. And not to let or underlet the whole or any part of the said premises, or to make or suffer any alteration to be made therein without the written consent of the party of the first part; and not to assign this Lease without the written consent of the said party of the first part. And it is further agreed that the said party of the first part shall not be called upon to make any improvements whatsoever upon the demised premises, or any part thereof, but the said party of the second part agree to keep the same in good order and condition at their own expense. And that at the expiration of said term, or any sooner determination of this

Lease, the said parties of the second part will quit and surrender the premises hereby demised in as good order and condition as reasonable use and wear thereof will permit, damages by the elements excepted. And if the parties of the second part shall hold over said term, with the consent, express or implied, of the party of the first part, such holding shall be construed to be a tenancy only from month to month, and said second parties will pay the rent as above stated for such further times as they may hold the same. The parties of the second part agree to pay the Water Rate during the continuance of this Lease, and that the lessee shall use the premises for a family dwelling for one family only consisting of two adults and one child of 15 years and that no house pets shall be kept on the premises without special and express permission.

And that the lessor shall turn over the complete property and furnishings thoroughly and completely cleaned with windows cleaned, blinds cleaned, floors cleaned, waxed, and polished and all trash removed and entire property ready for occupancy and that the lessees shall do exactly the same at the end of their tenancy. And that the lessor shall turn over the garden in good condition and that the lessees shall do all cultivating, fertilizing and irrigating necessary to maintain it during their tenancy and to return it in as good condition as they received it. And that the lessees shall pay for all their own utility services. And that the lessee shall pay for all repairs to the home or furnishings that cost less than ten dollars (\$10.00) and that the lessees shall

pay ten dollars (\$10.00) out of the total of all repairs when that cost is greater than ten dollars (\$10.00).

Receipt is hereby acknowledged of One hundred ten (\$110.00) which constitutes the first month rent under this lease.

In Witness Whereof, the said parties have hereunto, and unto a duplicate original hereof, set their hands and seals the day and year first above written.

/s/ BARBARA MCKITTRICK,

/s/ BRUCE A. WILSON,

/s/ BEATRICE S. WILSON.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 28, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause was commenced on August 3, 1950, the Plaintiff seeking restitution under Section 205 (a) of the Emergency Price Control Act of 1942 as amended (50 U.S.C.A. App. 901 et seq.), and treble damages under Section 205 and an injunction and restitution under Section 206(b) of the Housing and Rent Act of 1947 as amended (50 U.S.C.A. App. 1881 et seq.). Personal service of the complaint and summons as required by the Federal Rules of Civil Procedure was made by a

Deputy United States Marshal on August 8, 1950.

Following the Defendants' answers to the complaint and to the request for admissions and interrogatories served by the Plaintiff, the cause came regularly on for trial on December 28, 1950, before this Court, the Honorable Oliver J. Carter Judge presiding, and the Plaintiff appearing by its counsel William B. Spohn and the Defendants appearing in person and by their Counsel Francis T. Cornish. Evidence both oral and documentary was introduced by and on behalf of the respective parties, and arguments made and briefs filed by counsel. The Court being fully advised in the premises, made its order for judgment on February 12, 1951, and its amended order for judgment on April 25, 1951, pursuant to which are the following:

Findings of Fact

(1) That the housing accommodations described in the complaint are located within the Alameda County Defense-Rental Area.

(2) That the accommodations were originally registered by the Defendant Barbara McKittrick in the Area Rent Office on September 6, 1944, at a monthly rental of \$150, which was reduced to \$110 per month by order of the Area Rent Director issued April 3, 1945.

(3) That on or about July 13, 1946, the Defendants leased the accommodations to Bruce A. Wilson for one year at a total rent of \$1320.

(4) That as a condition thereof, although not mentioned in the lease, the Defendants required

the tenant to pay an additional \$300 in cash, representing an excess of \$25 per month over the prescribed rent for the accommodations.

(5) That upon the expiration of said lease in July, 1947, and continuing to or about November 13, 1949, the Defendants did demand, accept and receive from the tenant monthly rentals of \$135 for the accommodations, in total excess of the prescribed rent in the amount of \$700.

(6) That following the tenant's discovery of the prescribed rent later in November, 1949, he made a written request upon the Defendants for restitution of the total overcharges, which the Defendants failed to make, either in whole or in part.

(7) That no action has been instituted by the tenant under either of the aforesaid Acts on account of the overcharges here involved, and more than thirty days (30) have elapsed since the last such overcharge.

(8) That three of the aforesaid monthly overcharges of \$25 each for which damages are sought in this proceeding occurred within one year of the filing of the complaint herein.

(9) The three monthly overcharges of \$25 each were wilfully demanded, accepted and received within one year immediately prior to the filing of the complaint herein.

(10) That between July 13, 1946, and November 13, 1949, the tenants, Bruce A. Wilson and Beatrice Wilson, did not wilfully and wantonly

damage the premises nor the furniture and furnishings at 111 Oakmont Avenue, Piedmont, California, in the amount of \$1,225.00, or any sum whatsoever.

Conclusions of Law

(1) That the Court has jurisdiction of the subject matter of this action and of the parties under the aforesaid Emergency Price Control Act and the Housing and Rent Act.

(2) That the housing accommodations in question were controlled by the aforesaid Acts and the Regulations issued pursuant thereto with the exception of the period from June 30, 1946, to July 25, 1946.

(3) The maximum legal rent prescribed for the housing accommodations under the Acts and Regulations was \$110 per month at all times other than from July 13, 1946, to July 25, 1946.

(4) That the Defendants by demanding, accepting and receiving the overcharges specified in the foregoing Findings of Fact, did knowingly violate the Acts and regulations.

(5) That the Defendants have failed to satisfactorily show why the equitable power of this Court should not be exercised, or to satisfactorily assume the burden of proving that the acceptance of the overcharges within the year immediately preceding the filing of the complaint herein was not wilful nor the result of failure to take practicable precautions against such occurrence.

(6) That the Plaintiff, on account of said violations, is therefore entitled to have and recover treble damages from the Defendants in the total amount of \$225.

(7) That the Plaintiff, on account of said violations, is entitled to an injunction against any further violations by the Defendants under the aforesaid Housing and Rent Act and regulations as prayed for in the complaint.

(8) That the Plaintiff, on account of said violations, is entitled to a judgment and decree requiring and directing the defendants to forthwith refund to the Plaintiff on behalf of the tenant Bruce A. Wilson, or in the alternative to the Plaintiff on its own behalf in the event said tenant cannot be located after appropriate effort, the aforesaid overcharges in the total amount of Nine Hundred and Seventy-Five Dollars.

(9) That the defendants are entitled to take nothing by reason of their claim of set off for damages.

(10) That the Plaintiff is entitled to its costs in this action.

Let judgment be entered in accordance herewith.

Dated this 27th of April, 1951.

/s/ OLIVER J. CARTER,

United States District Judge.

Lodged April 27, 1951.

[Endorsed]: Filed April 27, 1951.

United States District Court for the Northern
District of California, Southern Division

No. 29940

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DONALD McKITTRICK and BARBARA Mc-
KITTRICK,

Defendants.

JUDGMENT AND DECREE

Findings of Fact and Conclusions of Law having
been filed in the above-entitled cause,

Wherefore, by reason of the law, the pleadings,
and the premises contained in said Findings and
Conclusions,

It Is Hereby Ordered, Adjudged, and Decreed
that the Defendants, their attorneys, agents, serv-
ants, employees and all other persons in active
concert or participation with the Defendants, be
and they are hereby permanently enjoined and
restrained from directly or indirectly demanding,
accepting, or receiving rents in excess of the maxi-
mum rents established by any regulation or order
heretofore or hereafter adopted pursuant to the
Housing and Rent Act of 1947, as heretofore or
hereafter amended, or from engaging in any other
acts or practices which violate the said Act or any
regulation or order adopted pursuant thereto.

It Is Further Ordered, Adjudged, and Decreed that the Defendants be and they are hereby required and directed to forthwith make restitution to the Plaintiff on behalf of the following named tenant, or in the alternative to the Plaintiff on its own behalf in the event said tenant cannot be located after appropriate effort, for the overcharges in the rental of the housing accommodations specified in this cause in the following sum, with interest at the rate provided by law.

Bruce A. Wilson.....\$975.00

It Is Further Ordered, Adjudged, and Decreed that the Plaintiff do have and recover of and from the Defendants the sum of Two Hundred Twenty-five Dollars (\$225.00), to be paid forthwith as treble damages for the wilful violations of the Act and Regulations involved in the aforesaid overcharges, with interest at the rate provided by law.

It Is Further Ordered, Adjudged, and Decreed that the Plaintiff do have and recover of and from the Defendants its costs in the amount of Forty-Two and 36/100 dollars (\$42.36), to be taxed by the Clerk and paid forthwith by the Defendants.

It Is Further Ordered, Adjudged, and Decreed that all payments made pursuant to this judgment shall be made to the Treasurer of the United States at the Litigation Section of the Office of the Hous-

ing Expediter, Room 712, Pacific Building, 821 Market Street, San Francisco 3, California.

Dated this 11th day of May, 1951.

/s/ OLIVER J. CARTER,
United States District Judge.

Lodged May 3, 1951.

Entered May 11, 1951.

[Endorsed]: Filed May 11, 1951.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Defendants, Donald McKittrick and Barbara McKittrick, hereby move the Court pursuant to Rule 59 of the Federal Rules of Civil Procedure for a new trial.

The Grounds upon which said motion is made are:

1. The Court has found that three monthly overcharges were wilfully demanded, accepted and received, which finding is contrary to the uncontroverted evidence that the parties had entered into a valid binding agreement to pay ceiling rentals only, which agreement would have been a defense to any action at law for the collection of an excessive amount, the emergency house and rent act to the contrary notwithstanding.

2. The Court made no findings as to the cir-

cumstances under which the premises in question were rented to Bruce A. and Beatrice Wilson, or as to the loss of money sustained by the defendants as a result of allowing said Wilsons to occupy the premises.

3. The Court made no findings as to the equities relative to restitution of overcharges collected more than a year prior to the commencement of the action, yet concluded "that the defendants have failed to satisfactorily show why the equitable power of this Court should not be exercised" notwithstanding the law placed upon the plaintiff the burden of showing that the equitable power should be exercised.

Dated May 21, 1951.

/s/ FRANCIS T. CORNISH,
Attorney for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 21, 1951.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of
the United States District Court for the Northern
District of California, held at the Court Room
thereof, in the City and County of San Francisco,
on Friday, the 8th day of June, in the year of our
Lord one thousand nine hundred and fifty-one.

Present: The Honorable Oliver J. Carter,
District Judge.

[Title of Cause.]

MINUTE ORDER

This case came on regularly this day for hearing
on motion for a new trial. Francis T. Cornish,
Esq., appeared on behalf of the defendant, and
William Spohn, Esq., was present for the plain-
tiff. After hearing respective counsel, the Court
Ordered that said motion be denied. Further Or-
dered that defendant be granted a stay of execution
until the time for appeal lapses.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Donald McKittrick and Barbara McKittrick, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 11th, 1951.

Dated July 9th, 1951.

/s/ FRANCIS T. CORNISH,
Attorney for Appellants, Donald McKittrick and
Barbara McKittrick.

[Endorsed]: Filed July 9, 1951.

[Title of District Court and Cause.]

STATEMENT UNDER RULE 75(d) OF POINTS ON WHICH APPELLANTS IN- TEND TO RELY ON APPEAL

In presenting their appeal the defendants and appellants intend to rely upon the following points:

1. The Judgment, and the Findings of Fact, especially Findings of Fact Numbers 4, 5 and 9, are not supported by the evidence and are contrary to the uncontradicted evidence.

2. Finding Number 10 is contrary to the uncontradicted evidence offered at the trial.

3. That the uncontradicted evidence offered at

the trial showed that there were equitable reasons why restitution should not be ordered, and Conclusions of Law Numbers 4, 5, 6 and 8 are not supported by the evidence, and contrary to the uncontradicted evidence, and are legally unsound.

4. The Court based its judgment on the theory that restitution was a matter of right and that the burden was upon defendants and appellants to show why the equitable power of the court should not be exercised, whereas the decisions of the United States Supreme Court have established that the burden is upon the party asking restitution to show why the equitable power of the Court should be exercised.

5. The Judgment is erroneous in that it is not supported by any Findings of Fact to the effect that facts exist either requiring or justifying the exercise by the trial court of its equitable power to grant restitution.

Dated July 9th, 1951.

/s/ FRANCIS T. CORNISH,

Attorney for Defendants and Appellants, Donald McKittrick and Barbara McKittrick.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 9, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO
DOCKET APPEAL

Pursuant to the provision of Rule 73(g) of the Federal Rules of Civil Procedure, it having been made to appear to the Court that through inadvertence a transcript pursuant to Rule 55(b) of the Federal Rules of Civil Procedure has not yet been filed, nor prepared by the stenographic reporter, and that notice of appeal was filed herein on the 9th day of July, 1951, and that it is not reasonably possible to complete the typing or filing of said transcript on or before the 18th day of August, 1951, and that in order to file said transcript the time provided for in the aforesaid Rule 73(g) ought to be enlarged, and good cause appearing therefor,

It Is Hereby Ordered that the time for docketing the record on appeal herein be, and the same is hereby, extended for an additional period of thirty days beyond the ordinary time provided, to wit, until the 17th day of September, 1951.

Dated August 9, 1951.

/s/ OLIVER J. CARTER,
District Judge.

[Endorsed]: Filed August 9, 1951.

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF THE RECORD TO BE INCLUDED IN THE RECORD ON APPEAL

The defendants and appellants, Donald McKittrick and Barbara McKittrick, hereby designate the following to be contained in the record on appeal:

1. The Complaint.
2. The Answer of Defendants Donald McKittrick and Barbara McKittrick.
3. Plaintiff's Requests for Admissions.
4. Reply to Requests for Admission of Facts.
5. Plaintiff's Interrogatories.
6. Answer to Interrogatories served by mail October 11, 1950.
7. Reporter's Transcript, including all exhibits, of the testimony taken at the trial of the cause.
8. Order for Judgment.
9. The amended Order for Judgment.
10. The Findings of Fact and Conclusions of Law.
11. The Judgment.
12. The Memorandum of Costs and Disbursements, together with affidavit of service.
13. The Motion for a New Trial.
14. The notice of Time and Place of Hearing Motion for New Trial.
15. The Order Denying Motion for a New Trial.
16. The Notice of Appeal.
17. The statement under Rule 75(d) of points on which appellants intend to rely on appeal.

18. This designation of portions of the record to be included in record on appeal.

Dated July 9th, 1951.

/s/ FRANCIS T. CORNISH,
Attorney for Defendants and Appellants, Donald
McKittrick and Barbara McKittrick.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 9, 1951.

In the United States District Court for the North-
ern District of California, Southern Division
No. 29940

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DONALD McKITTRICK and BARBARA Mc-
KITTRICK,
Defendants.

Before: Hon. Oliver J. Carter, Judge.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the United States:

SIDNEY FEINBERG, ESQ., and
WILLIAM B. SPOHN, ESQ.,
Office of Housing Expediter.

For the Defendants and Appellants:

FRANCIS T. CORNISH, ESQ.

December 28, 1950—10:00 A.M.

The Clerk: United States versus McKittrick.

Mr. Spohn: Ready for the plaintiff.

The Court: Will counsel state appearance for the record, please?

Mr. Cornish: Francis T. Cornish, representing both defendants, your Honor.

The Court: Mr. Spohn, you are appearing for whom?

Mr. Spohn: William B. Spohn for the Government.

The Court: You may proceed.

Mr. Spohn: If the Court please, this matter involves a complaint under the Housing and Rent Act of 1947 as amended, growing out of the overt alleged overcharges in the rental of certain premises at 111 Oakmont Avenue, Piedmont, which are located within the Alameda County Defense Rental Area.

The overcharges in question occurred during the period July, 1946, to November, 1949, involving a \$300.00 bonus exacted by the defendants from the tenants at the outset of the tenancy, and monthly overcharges for the remaining months of the tenancy from July, 1947, through November of 1949, totaling \$1,000.00 in all, for which the plaintiff seeks restitution on behalf of the tenant, Bruce Wilson, and damages of \$225.00, representing treble the amount of the overcharges occurring within the one-year period preceding the institution of this action. [2*]

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: Are you sure of that figure, counsel, for the treble damages?

Mr. Spohn: Yes.

The Court: May I see the complaint here for a moment?

(The Clerk hands the complaint to the Court.)

The Court: I have examined this in a sort of cursory fashion, and in referring to the schedule which is attached to the complaint, I notice the amount there as stated, subject to treble damages, is \$75.00.

Mr. Spohn: Yes, that is the actual amount of the overcharges which is subject to treble, times three.

The Court: Three times seventy-five?

Mr. Spohn: Yes, sir, and that is spelled out in the prayer attached to the complaint.

The Court: Yes. Well, I just had an opportunity to examine this very cursorily.

Mr. Spohn: In other words, three overcharges of \$25.00 each occurring within that one-year period.

The Court: Yes, three times \$75.00—all right.

Mr. Spohn: The matter came to the attention of the Area Rent Office through an inquiry made by the tenant after he had removed from the premises in November, 1949. The efforts of the Area Rent Office to secure a refund from the defendant landlord proved unsuccessful over a period of months. The matter was accordingly referred to litigation

and this complaint [3] was filed and served in August of 1950. The pleadings followed in due course thereafter and may be summarized in this fashion:

In the answer, the defendants admitted being the landlords of the premises, but denied the other allegations item by item, and countered with a charge that the premises had been damaged by the tenants.

The Court: In a sum in excess of the——

Mr. Spohn: Yes, in a sum in excess of the total amount of restitution sought. The plaintiff therefore served request for admissions on behalf of the defendant which brought these admissions: First, that they admitted again that they are the landlords; secondly, they admitted that the name of the tenants and the period during which the tenants had occupied the premises; and they admitted that there had been no action brought by the tenants on their own behalf to recover the excess charges. However, they did deny the amounts collected from the tenants, and they did deny the applicable legal maximum rent for the premises.

Thereafter, the plaintiff served interrogatories on the defendants in order to focus the issues, or bring them within focus, and as a result the answer to the interrogatories brought forth an admission of the amounts collected from the tenants in the particulars set forth in our exhibit. In other words, dollarwise the defendants admitted that they had collected that much money, but they contended that, first, in July, 1946, [4] when the tenants went into

occupancy, that the tenants had paid \$300.00 voluntarily in order to induce the defendant landlords to forego their right as owners to occupy the premises, and that in July, 1947, after the first year's lease had expired, the tenants renewed such so-called inducement, paying at the rate of \$25.00 per month thereafter in excess of the \$110.00 which was specified in the written lease.

Thus, as a result of the pleadings, there are two issues to be determined: First, the legal maximum rent for the premises, which we are prepared to show by the records of the Area Rent Office, through a representative of that office; and, secondly, the facts of the rental arrangements, which are to be shown by the tenants Wilson and his wife.

I might say, your Honor, that as to the second, we could almost submit the other pleadings with citation to the law and the regulations; however, because of the curious circumstances as to the voluntary arrangement and what-not, I believe that the record would be more complete if the tenants on testimony were introduced in chief, and we are therefore prepared to introduce the testimony of the tenants, Bruce Wilson and his wife, Beatrice Wilson, who was with him at the time they rented, and who occupied the premises with him.

The Court: Mr. Cornish, would you proceed to state the theory upon which the defendant is proceeding in this case, and to give the Court such background as you deem advisable in [5] order to enable the Court to follow this matter with some degree of intelligence?

Mr. Cornish: I shall be glad to do so, your Honor.

Until I heard Mr. Spohn talk this morning, it never occurred to me—and I don't think that any one could, in reading the complaint, derive the inference from the complaint that they are seeking to recover for and on behalf of the tenant, the amount of the overcharge.

Now, there is nothing in the complaint that indicates that this is a suit brought by the Government for and on behalf of the tenant, nor do I know of any authority which permits the Government to bring such an action by and on behalf of the tenant.

The law, up until the time of the last amendment to the Federal Housing Act, gave the Government no right. There was a period of some two years that the Government had no right to bring an action to recover the overcharges. The action had to be brought by the tenant and he had to bring it within a year.

Now, more than a year has elapsed between the time that the last amendment went into effect and the time that this was filed. Consequently, the tenant was barred by the statute of limitations.

The Court: I notice now you raise that in your pleadings.

Mr. Spohn: Yes.

Mr. Cornish: Yes. [6]

The Court: I assume you are familiar with the line of cases that allow the Government to proceed in these actions on the theory that this is an equitable recovery.

Mr. Cornish: On the theory that there is a line of cases which allow the government to bring an action and to give the Court the power, sitting as a court of equity, to direct restitution. Now, there is no doubt about that, but that is not an action to recover for and on behalf of the tenants. That is an act of restitution, and we assumed that in such an action there are certain equitable defenses that are available that would not be available in a legal action brought by the tenant, or brought on behalf of the tenant for the recovery of the specific amount of money.

Now, this property belonged to Barbara McKittrick, and she and her husband had occupied it as their home. They were moving to Walnut Creek and went to the office of the Area Rent Control in order to get a ceiling rent established, so they were given the same story that is given by the Area Rent Control to all people who come in seeking to find out where they stand on a case of this sort. They are told that the Area Rent Control does not fix a rental until they are first rented. You go out and rent it and make your lease for whatever you think is fair, and then file your listing with us and we will fix the rent.

Now, depreciating the fact that once they had leased to [7] a tenant and gave the Area Rent Control jurisdiction to fix the rent, that they are frozen with a tenant in possession that they could not evict except to come back and occupy it themselves, and they had to accept that rent and no more than that amount of rent, these people were induced

to enter into this lease for \$150.00 a month, and then the Area Rent Control shaved the rent down to \$110.00. When the occupancy of that tenancy expired, the McKittricks were not in the position of owning this home in Piedmont, the rent for which the Government had frozen at \$110.00 per month, and they also had a nine-room home with three baths in Walnut Creek that was not subject to rent control, and which they could have rented easily at \$150.00 per month or more—there was no limit on it. The house was desirable and was readily rentable. So they proposed to move back into this house, and when the Wilsons came to them and desired to become tenants, they explained that they could not afford to pay the additional to absorb that loss of the \$40.00 per month that the Rent Control Office had cut them in freezing the rent, and that therefore they intended to move into it themselves.

So this proposition of paying the extra \$300.00 came from the tenants originally. They said, "Now, if you will just stay in Walnut Creek and won't move back into this house and will let us move in, we will pay—we won't pay \$150.00, but we will pay \$135.00, or we will give you an extra \$25.00 per month, and we will give it to you all in one check at the beginning of the [8] term."

Now, in the request for admissions, the request number four was a request that we admit that the items in said Exhibit A truthfully and correctly designate the rentals collected from said tenants.

Now, we denied that—and I would like to call

your Honor's attention to the fact that we had to deny that because, from July 13, 1946, to July 13, 1947, we did not collect \$300.00 rent. We collected one hundred, ten times twelve, plus three hundred. Now, whether that was an oversight on the part of the Area Rent Control, or the Government, in asking for that admission, whether they didn't realize that they hadn't put in the total amount of rent collected for that period or not, I don't know what the circumstance was, but it was necessary for us to deny it.

When we were asked in the interrogatory as to what rent had been collected—reported, in answer to the interrogatory, this \$300.00 that was paid in the inception as a bonus or inducement to the McKittricks not to move back into this house, but to allow it to be occupied by a tenant. Then, when the year's lease was up, again the McKittricks were prepared to rent their house in Walnut Creek and move back into Berkeley, because for a difference of \$40.00 per month, which it would automatically increase their living cost, and they were to rent the Piedmont house out instead of the Walnut Creek house, again [9] the proposition was made, "Well, we will pay you the same amount again, but it would be a convenience to us if, instead of paying three hundred at the beginning, we just add \$25.00 each month."

Now, leases were drawn for \$110.00 per month right along. We have those leases prepared to offer in evidence. The tenant was as much a partner to this transaction as the landlord. It was a tenants'

proposition, and the landlord has suffered from what, if forced to make restitution, because it would result in increasing the landlord's living expense by \$30.00 per month during all this time, when it could have just as well been saved.

Now, in addition to that, the tenant agreed to keep the property in repair. Instead of keeping the property in good condition, they took some of the furniture and the furnishings up into the attic and stored them up there, and made no provisions for the protection of the property against moths and dampness and as a result, as we have set forth, substantial damage to the furniture and furnishings in the house as a result of the neglect on the part of the tenant; and they even walked off with some of the property when they moved out, took it along with them. Now, all those things are material if this is an action in equity to ask for restitution.

Now, I don't feel that when a tenant goes in and does you a couple of thousand dollars damage, that it is becoming to the [10] government or becoming to the tenant or for anyone else to ask you to make restitution of an overcharge that amounts to only half of that amount, without, at the same time, making provision in some way for compensation for that damage.

Now, the tenants are not parties to this suit and this Court hasn't the jurisdiction to order the tenants to make such restitution to the landlord, and the government in bringing an equitable action has foreclosed us from the right to sue the tenant

in this proceeding, but all that is material, as I say, to the question of restitution.

Now, really, the only question that is involved in the case is the equitable defense against restitution, and so far as the \$75.00 is concerned—that is the three months overcharge—first, whether or not it should be trebled; and secondly, whether or not anything is due by reason of the tenant having damaged the landlord and having been indebted to the landlord greatly in excess of any overcharge in the rent.

Now, I think our evidence will disclose, and your Honor will be satisfied after hearing the evidence, that the damage to the McKittricks was greatly exceeded by any amount for which the government is asking judgment, for which government is asking judgment either for the Treasurer of the United States, or by way of the restitution, and it would be inequitable or unjust to give the government any kind of relief under these circumstances. [11]

Mr. Spohn: If the Court please, before offering any evidence, may I clear up one or two points that have been raised by counsel's opening statement?

The Court: Yes.

Mr. Spohn: In the first place, as to the surprise which he experienced upon hearing me say for the first time that we are seeking restitution on behalf of the tenants, may I call his attention to Paragraph II of the complaint which was filed in August of this year, in which the plaintiff asked that the defendant be ordered and directed to pay to

the Treasurer of the United States for and on behalf of all persons entitled thereto, a refund of all amounts, which amount is presently ascertained by the plaintiff to be the sum of a thousand dollars in excess of the lawful maximum rents which have been demanded from these tenants for and in connection with the use and occupancy of the housing accommodations hereinabove mentioned.

Mr. Cornish: Will you concede, Mr. Spohn, that your language was: "for and on behalf of the persons entitled thereto," and not, "for and on behalf of Bruce Wilson and wife"?

Mr. Spohn: I think that confession is beside the point. I think the language is clear. Certainly your tenants were advised, your clients were advised in the Area Rent Office during the lengthy efforts that we made by that Office between November of 1949, and the time this matter went to litigation in August, of exactly what was sought, restitution of the [12] overcharges to the tenants Wilson for the excess amounts. I think that is perfectly clear.

The Court: For the purposes here, the argument is immaterial insofar as this Court is concerned. The statute is plain that the government has the power to seek restitution. The cases are clear. The cases, there are so many of them on the records that it would be useless to attempt to cite them as authority, where restitution has been made under that statute, and that phase of the case creates no problem. I am interested in the legal theory of the equitable defense to this action which is in its nature an equitable action for restitution, and I

might be very frank to say to counsel that I haven't had that defense raised before—that is, to both counsel—and that I would like to have the authorities on that phase of the subject so that I might be able to pass on this question, with assistance of counsel on that matter.

Mr. Spohn: In immediate answer to that question, your Honor, the practice has been well established in cases brought under this statute, and the Emergency Price Control Act of 1942, of allowing equitable defenses to be interposed, even as against the tenants who are not parties in action. They are parties in interest inasmuch as they were the ones who were overcharged in the first instance, and they are the parties for whom restitution was sought by the government as incident to the enforcement action brought by the government in its own [13] name.

The Court: I believe that the primary authority for that practice may be found in the decision of the Supreme Court in *Porter versus The Warner Holding Corporation*. I can give you the citation later this morning. I am familiar with the subject.

Mr. Spohn: That was brought under the Emergency Price Control Act of 1942, as amended, and was one of the first occasions that the court took to discuss at some length the rent control features.

The Court: Well, it's your position at this point that the equitable defenses are proper?

Mr. Spohn: Yes. They may be interposed.

The Court: Yes.

Mr. Spohn: And for that reason, we took no exception to them.

The Court: And it is your theory here that this is an equity action, and in all the equitable defenses, the government stands in a different position, of course, than the tenants; but, nevertheless, this action here is seeking to bring restitution for an attempt——

Mr. Spohn: We bring it under the double heading of the two sections of the Act.

The Court: Of course, that is the theory upon which the statute is not made applicable to the government.

Mr. Spohn: That's right. [14]

So that the equitable phase of the action is drawn under Section 206, whereby we seek an injunction against further violations, and restitution of the overcharges. The legal aspect of the action, of course, is brought under Section 205, whereby we seek damages to the government for the violations.

The Court: Yes.

Mr. Spohn: And as your Honor has expressed, the limitation—the time limitation in Section 205 applies only to the damage count, and not to the restitution sought under the other Section, 206b.

The Court: That is my understanding of the cases now, at least. I confess that sometimes I may find something in the cases that is hard to reconcile with some of the other cases that I have seen on the subject.

Mr. Spohn: May I make one further observation, and that is this: That the curious story about

the inducement voluntarily offered by the tenants appeared for the first time in the answer to the interrogatories. It didn't appear during the seven or eight months' negotiations in the Area Rent Office. It didn't appear in the answer to the complaint; it didn't appear in the answer to the request for admissions; and not until the late date of October 30th did it appear, in the reply to the interrogatories.

The Court: Well, I suppose that will have to be adduced by evidence. [15]

Mr. Spohn: It will be, and we are prepared to meet it.

The Court: And I would suggest now, I think we have arrived now at the point where we know generally the points at issue, unless you have anything further.

Mr. Spohn: No, I have nothing further to say, and the first witness I should like to call is Cyril Saroyan.

CYRIL SAROYAN

called as a witness in behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Spohn:

Q. Would you state your name to the Court?

A. Cyril M. Saroyan.

Q. Spell your last name.

A. (Spelling): S-a-r-o-y-a-n.

The Court: Mr. Saroyan, spell your first name

The Witness (Spelling): C-y-r-i-l.

(Testimony of Cyril Saroyan.)

Q. (By Mr. Spohn): Mr. Saroyan, you are the rent attorney to the Alameda County Defense Rental Office? A. I am.

Q. How long have you been connected with that office?

A. Approximately three and a half years.

Q. In your capacity as Area rent attorney, do you have access to the records of the Office?

A. I do.

Q. Have you consulted those records concerning the [16] registration statements for the premises at 111 Oakmont Avenue in Piedmont, California?

A. I have.

Q. Do you have with you the original registration statement? A. I do.

Q. Do you also have a copy of it?

A. I also have a certified copy, an exact duplicate.

The Court: I take it this is 111 Piedmont Avenue in Oakland, is it?

Mr. Spohn: No, it is 111 Oakmont Avenue in Piedmont.

I am offering the original registration statement.

Mr. Cornish: You are not offering the whole thing?

Mr. Spohn: No, I am only offering the original registration statement with the adjustment noted on the rear, the same as the original side.

Mr. Cornish: Very well.

Mr. Spohn: With the Court's permission I should like to offer in evidence the certified copy of

(Testimony of Cyril Saroyan.)

the original registration statement which has been produced by the witness and which has been seen in court by counsel for the defendant.

The Court: It may be admitted into evidence as Plaintiff's Exhibit No. 1.

(A carbon copy of the registration of rental dwelling, office copy, was received in evidence and marked Plaintiff's Exhibit No. 1.) [17]

PLAINTIFF'S EXHIBIT NO. 1

GENERAL INSTRUCTIONS

The landlord is required to register separately each rental unit, whether occupied or vacant. A dwelling unit is a room or a group of rooms for which a single rent is paid. Complete Registration Statement in triplicate. (If not typewritten, be sure ink pressure is used so that both carbon copies are clear and distinct.) Use carbons, and mail or bring the three copies to the Area Office, in triplicate, for sections "D" and "E" if necessary.

Rent Office.

Effective
Date

3/1/42 7/1/42

SECTION A. MAILING ADDRESS OF LANDLORD

Name of Landlord Mrs. Donald McKittrick
Name of Agent
Address Mail to: 5-246 - Ocean View Dr.

SECTION C. MAXIMUM RENT

Read carefully and fill in every item which applies to this dwelling unit.

Rent on "Maximum Rent date" \$ 150.00 per week () per month ()
Not rented on "Maximum Rent date" but rented at any time during the two-month period ending on "Maximum Rent date."

Date last rented during that two-month period: 194

Rent on that date: \$ 150.00 per week () per month ()

Not rented on "Maximum Rent date" nor at any time during the two-month period ending on "Maximum Rent date," but rented after "Maximum Rent date."

Check one box if applicable:

- (a) Owner occupied or vacant on "Maximum Rent date" and during two-month period ending on "Maximum Rent date."
(b) Newly constructed without priority rating.
(c) Newly constructed with priority rating. (If checked, item 6 must also be filled in.)

Date first rented after "Maximum Rent date." Aug 6 194 4

Rent on that date: \$ 150.00 per week () per month ()

Dwelling unit made available by a change which resulted in an increase or decrease in the number of dwelling units after "Maximum Rent date."

Date first rented after such change: 194

Rent on that date: \$ 150.00 per week () per month ()

Substantially changed after "Maximum Rent date," but before the "effective date." Check one box if applicable:

- (a) From unfurnished to fully furnished.
(b) From fully furnished to unfurnished.
(c) By a major capital improvement AS DISTINGUISHED FROM ORDINARY REPAIR, REPLACEMENT AND MAINTENANCE.

Date first rented after such change: 194

Rent on that date: \$ 150.00 per week () per month ()

Dwelling unit newly constructed with a priority rating from the United States or any agency thereof.

Rent approved by agency granting priority: \$ 150.00 per week () per month ()

THE MAXIMUM RENT FOR THIS DWELLING UNIT IS:

\$ 150.00 per week () per month ()

Enter Maximum Rent in accordance with the following instructions:

- (a) If only one of the above items applies to this dwelling unit the Maximum Rent is the rent entered for that item.
(b) If more than one of the above items apply to this dwelling unit the Maximum Rent is the rent reported for the most restrictive item.
(c) If item 3 applies to this dwelling unit the Maximum Rent is the lower of the rents entered in Items 1, 3 or 6.
(d) If item 5 applies to this dwelling unit you must also fill in the information required in Section "E." The Rent Director may at any time order a decrease in the Maximum Rent determined under Items 3(a), 3(b), 3 or 5, on the grounds that the rent is higher than the rent generally prevailing for comparable housing accommodations on the "Maximum Rent date."

Order issued by Rent Director dated April 3, 1945 established maximum rent is amount of

\$ 150.00 per week () per month () ala A 5555-c

Section E - See Note Section C. 7*

If item 3(b), 4 or 5 of Section C was filled in, set forth in specific detail the type and cost of:

- (a) New construction (c) A change from unfurnished to fully furnished
(b) A change in the number of dwelling units (d) A major capital improvement

(b) - C. V.

UNITED STATES OF AMERICA
OFFICE OF TEMPORARY CONTROLS
OFFICE OF PRICE ADMINISTRATION
REGISTRATION OF RENTAL DWELLINGS
(TYPE OR PRINT PLAINLY - DO NOT FOLD)
(Do Not Use This Form for Hotels and Rooming Houses)

Form Approved Budget
Bureau No. D8-R1745
Form DD-U
AREA OFFICE
COPY

IDENTIFICATION

1. 111- Oakmont Ave.
Address of this rental dwelling unit
2. None
Apartment number or location
3. Number of Rooms in unit being registered 4 1 in kitchen
4. Total Number of dwelling units in this structure

SECTION B. MAILING ADDRESS OF TENANT

Name of Tenant Mrs. & Mrs. P. Van Dyke
Address 111- Oakmont Ave.
City and State Piedmont 10 Calif

SECTION D. EQUIPMENT AND SERVICES.

(Check the equipment and services included in the rent on "Maximum Rent date" or the most recent date you entered in Section C.) (ANSWER "YES" or "NO".)

1. EQUIPMENT YES NO
Furniture ☒ ☐
Running Water ☒ ☐
Hot Water ☒ ☐
Flush Toilet ☒ ☐
Bathroom ☒ ☐
Central Heating ☒ ☐
Harding Stove ☒ ☐
Mech. Refrigerator ☒ ☐
Electricity Installed: ☒ ☐
Cooking Stove ☒ ☐
If any equipment is shared, explain below:

2. SERVICES YES NO
Garage double ☒ ☐
Heat or Heating Fuel ☒ ☐
Cooking Fuel ☒ ☐
Cold Water ☒ ☐
Hot Water ☒ ☐
Light ☒ ☐
Ice or Refrigeration ☒ ☐
Janitor Service ☒ ☐
Garbage Disposal ☒ ☐
Painting & Decorating ☒ ☐
Interior Repairs ☒ ☐
Exterior Repairs ☒ ☐

List any other services:

Radios - Oriental rug
Suburb - Chinese
Good table linen
Are any equipment or services indicated above now included in the rent? Yes () No ()
If "No" you must also file Form D-2.

WARNING

The rent for this dwelling unit on and after the "effective date" can be no more than the Maximum Rent entered in Section C, Item 7, unless changed by order of the Rent Director (see Section C, Item 8).

A false statement on this form or an evasion or attempted evasion of the Maximum Rent Regulation may subject you to a \$5,000 fine or imprisonment for one year.

I HEREBY REPRESENT that all statements and entries given herein are true and correct.

PA R 30 54 CHITTRICK
(Signature of Landlord or his Agent) (Date)

(Testimony of Cyril Saroyan.)

Mr. Spohn: May I call the Court's attention to some of the essentials on the statement?

Q. Mr. Saroyan, would you point out to the Court some of the essentials of this registration statement? In the first place, by whom was it made?

Mr. Cornish: Objected to on the grounds that the document speaks for itself.

The Court: Well, the document does speak for itself, but this testimony is in the nature of explanation.

Mr. Cornish: I assume counsel's theory is that the statement is so ambiguous that it needs explaining.

The Court: No, I don't think that is the theory. However, the document does speak for itself, counsel.

Mr. Spohn: Well, may I call it to your Honor's attention?

The Court: You can argue any part of it you desire.

Mr. Spohn: May I call your attention to this, your Honor? First to the facts appearing in the registration statement that it was made by Barbara McKittrick, filed in the Area Rent Office September 6, 1944.

The Court: I will permit the witness to testify as to the procedure in making these; as to the substance that is on the document itself, the objection is good, but as to the procedure, I will allow,

(Testimony of Cyril Saroyan.)

as to how this document is made. The witness may testify.

Q. (By Mr. Spohn): Will you testify, Mr. Saroyan, along the [18] line suggested by the Court in order to bring the way in which this registration statement was received and the action taken thereon by the Area Rent Office in following its receipt.

A. I will, sir.

The property was registered by Barbara McKittrick, September 6, 1944, and on the registration statement it is indicated that it had been owner-occupied previous to that time, and up and to August 6, 1944, at which time it was first rented to Mr. and Mrs. R. Van Dyne.

The Court: Mr. Saroyan, what I would like to know is, does the landlord make out the registration statement, or somebody on behalf of the landlord?

The Witness: It varies, I mean, a landlord can make it out, or it can be made out by someone at the Area Rent Office, that is, by one of the interviewers.

The Court: At the request of the landlord?

The Witness: Yes, and then it is signed and authenticated by the landlord.

The Court: The point is that the information disclosed on this is supplied by the landlord, is it not?

The Witness: That is correct.

The Court: All right.

The Witness: It indicates a house at 111 Oakmont Avenue, Piedmont, 8 rooms. Also there is a

(Testimony of Cyril Saroyan.)

little plus there, one in the attic and one in the basement. [19]

The Court: Well, the information there speaks for itself, I gather, but the thing that I was interested in was whether or not the instrument is either made out at the request of the owner, by the owner himself, or at his or her request.

Q. (By Mr. Spohn): Mr. Saroyan, will you explain to the Court what action was taken by the Area Rent Office following receipt of this original registration in September, 1944?

A. Proceedings were instituted thereafter to reduce the rental from the \$150.00 figure to \$110.00 per month.

Q. At whose instance were those proceedings initiated?

A. At the instance of the tenants in occupancy at that time, the Van Duynes.

Q. And what action was taken by the Area Rent Office?

A. The rental was reduced from \$150.00 per month to \$110.00 per month and that was done on April 3, 1945.

Q. On what basis was that reduction made?

A. On the basis of the section in the Rent Regulations which says that the rental, first rental, may be reduced on the basis of comparability; that is, reduced to a rental comparable to accommodations, to the type and size and services being supplied to the tenant.

Q. In other words, Mr. Saroyan, was this first

(Testimony of Cyril Saroyan.)

rent of \$150.00 reduced to \$110.00 by the Area Rent Office on the basis of comparability to similar accommodations? A. That is correct. [20]

Q. Now, how long did this \$110.00 rent remain in effect? Was there any action taken thereafter on it?

A. The \$110.00 rental remained in effect from April 3, 1945, to November 23, 1949.

Q. What change was made on November 23, 1949?

A. At which time the rent was increased from \$110.00 to \$130.00.

Q. By—— A. By the Area Rent Office.

Q. At whose instance?

A. At the instance of the landlord based upon a petition for an increase due to increased costs of maintenance, repair work, taxes, and other such items.

Q. Were there any—in your examination of the files, Mr. Saroyan, did you find any other record of adjustments or applications for adjustments on these premises?

A. Between the dates that I have mentioned, or subsequent?

Q. No, between the date of the reduction in April of 1945, and the petition filed by the landlord, November 23, 1949.

A. I have not. The rent remained at \$110.00 and there is no evidence of any application—pardon me, for any rental adjustment.

Q. During that period?

(Testimony of Cyril Saroyan.)

A. During that period.

Mr. Spohn: I have no further questions of Mr. Saroyan at [21] this point.

The Court: You may cross-examine.

Cross-Examination

By Mr. Cornish:

Q. Mr. Saroyan, may I take a look at that file you have been looking at? A. Yes.

Q. The whole thing.

A. All right. (Handing file to Mr. Cornish.)

Mr. Spohn: If the Court please, during this interval may I give the citation on that case? 328 U.S. 395, decided 1946.

The Court: Thank you.

Mr. Cornish, how much longer do you think it will take you to go through those documents?

Mr. Cornish: About five minutes.

The Court: Well, if you are going to require time, I think we should take the morning recess at this time for ten minutes so that you may complete the examination of the file, and then upon reconvening, you will be prepared to cross-examine this witness.

Mr. Cornish: Yes, your Honor, I will.

The Court: Recess.

(A ten-minute recess was taken.)

(Testimony of Cyril Saroyan.)

After Recess

The Court: Proceed with your cross-examination, Mr. Cornish. [22]

Cross-Examination

(Continued)

By Mr. Cornish:

Q. Mr. Saroyan, at the time that the order was made reducing the rent, the original tenants that applied for reduction were not in possession, were they?

A. I don't know. I could check the records to see.

Mr. Spohn: If your Honor please, I object to that as not being material to the issue here involved. This witness is on the stand and his testimony was directed particularly and solely to the legal maximum rent. Now, whether there was another tenant in possession at the time or not, is really not material to the action. He has testified as to what the registration shows.

The Court: He has testified as a custodian of the original documents, and the only thing is, that I want to ask you, Mr. Cornish, what is your theory of the materiality of this line of questioning?

Mr. Cornish: The theory of the materiality, your Honor, is this: That the petition was filed by the tenants in possession, and the determination was not made until after that tenant had gone out, and as far as the petition was concerned, it was a

(Testimony of Cyril Saroyan.)

moot question. The second tenant had come into possession and had been in possession for several months at the time that the Area Rent Control Office determined to reduce the rent.

The Court: Well, what difference would that make as to whether or not the tenant was in or out of possession, insofar [23] as this Court is concerned. Here is an administrative officer who made a decision. I don't think it is the function of this Court to go into the correctness or incorrectness of the administrative decision. If there was an error in that, the remedy of the statute is set forth in the statute, and it is not in this Court, and this is, in essence, a collateral attack upon the findings of the administrative official.

Mr. Cornish: We set up in the answer, your Honor, that there was valid order reducing the rent to \$110.00 per month, we set that up in our answer. Now, my point is that if a tenant asks for a reduction in the rent and it is not retroactive and does not affect that tenant's right, when that tenant goes out of possession and ceases to have an interest in the subject matter, the petition becomes moot and this witness has testified that the rent was reduced on the application of a tenant.

Now, at the time the rent was reduced, the tenant wasn't interested in the property, and there was no order made, any rent control that in any way affected the rights.

The Court: But the point is, is that erroneous or sound?

(Testimony of Cyril Saroyan.)

Mr. Spohn: If it were not jurisdictional, it would make no difference.

The Court: That's right.

Mr. Cornish: But if it were jurisdictional, if the petition under which the order was made was moot at the time—— [23-A]

The Court: I don't think that goes to the jurisdiction. Now let's go further. If there was an error, then there is a procedure for an appeal to a higher authority inside the administrative agency, and then finally for an appeal to the Supreme Court of the United States.

Mr. Cornish: That is correct, your Honor. I agree.

The Court: I have just finished a rather exhaustive study of that jurisdictional point, and I don't see how this would be material. This court's jurisdiction is the jurisdiction to determine whether or not there has been a violation of the Act. Now, the orders that are valid on their face coming from the rent control authorities, the administrative agency, cannot be attacked in this court if they are valid on their face. Now, this witness has testified——

Mr. Cornish: I appreciate that.

The Court (Continuing): ——that the order was made and that it was made at the request of the tenant. Now, whether or not that tenant was in possession at the time the order was made, seems to me to be immaterial here.

Mr. Cornish: All right.

(Testimony of Cyril Saroyan.)

The Court: I will sustain that objection and you can proceed to question further.

Q. (By Mr. Cornish): Could you show me the petition made by the tenant to reduce the rent?

Mr. Spohn: Again, your Honor, that strikes the same line [24] that has been held immaterial. What difference does it make, as your Honor has said? The agency did make a determination reducing the rent from that which had been first set by the landlord when the premises were first put into the rental market, and at that time the premises came within the jurisdiction of the federal government, and under the Price Control Act.

The Court: The point is—and I presume, Mr. Cornish, your point is that that does go to the jurisdiction——

Mr. Cornish: Certainly.

The Court (Continuing): ——of the administrative officer who is in charge here.

Mr. Cornish: Without an application made by someone to reduce, why, certainly they have no jurisdiction.

Mr. Spohn: Oh, that point, counsel, is wrong, because the agency itself, acting on its own initiative, could have made the determination.

Mr. Cornish: All right, if that is the fact, that witness could have so testified. It is admissible for the purpose of impeaching the witness.

The Court: Well, I will overrule this objection, and try to find out.

(Testimony of Cyril Saroyan.)

Q. (By Mr. Cornish): May I see the petition of the tenants to reduce the rent?

The Court: He asked if a petition was filed.

Mr. Cornish: I want to see the petition filed by the [25] tenants to reduce the rent.

The Witness: I don't know whether you would call that a petition. It is the tenants' copy of the registration, with a statement on the reverse side saying that he believes the rent to be too high at \$150.00.

Q. Would you detach that from the file, please?

Now, on September 19, 1944, the Area Rent Office had a standard form of printed petition for reduction of rents, did they not?

A. Yes, I believe they did.

Q. All right. Now, was such a form ever filled out by any tenant? In this case, I want to know whether there was such a form ever filled out that you know of?

A. Not that I know of.

Q. Not that you know of?

A. We have just that——

Q. In other words, the document that you have just handed me, on the back of it, what you call the tenants' copy of the original listing——

A. No, the registration statement.

Q. (Continuing): ——the registration statement is the only document in the nature of a petition that was ever filed with the Area Rent Office for reduction of the rent?

A. That is correct.

Mr. Spohn: I will object to any further line of [26] questioning of this nature. It is outside of

(Testimony of Cyril Saroyan.)

the scope of the direct examination, and as the Court has pointed out, an attempted collateral matter which this court can't——

Mr. Cornish: It is impeachment of the witness. He testified without any difficulty at all.

Mr. Spohn: To the issuance of an order, and that question is not in dispute.

The Court: Proceed.

Mr. Cornish: The witness testified without any difficulty. He named the tenant and said the petition of a particular tenant. Now, I have got a right to show that that statement is false, if I can.

The Court: You have a right to go into the matter.

Mr. Cornish: And I am offering in evidence this document, and ask that it be marked as Defendant's Exhibit A.

The Court: Well, it may be admitted in evidence.

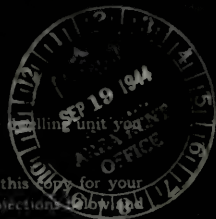
Mr. Cornish: As being the only document in the nature of a petition for the reduction of rent that has ever been filed.

The Court: Admitted.

(A document entitled: Registration of Rental Dwelling, tenant copy, was received in evidence as Defendant's Exhibit A.)

No. 29940
 Exhibit No. A
 DEC 28 1950
 C. W. Calbreath, Clerk

INSTRUCTIONS TO THE TENANT



1. ~~Before~~ After landlord has submitted this Registration Statement for the dwelling unit you occupy. Read this form carefully.
2. If the statements on the other side are correct you may retain this copy for your own use. If you disagree with any of the statements, list your objections and return this copy to the local Area Rent Office within 15 days.

Furniture in bad state of disrepair, many articles broken.
Dishes broken and insufficient - Tenant had to purchase new set.
"Pool Table" has dozens of holes in felt
"Ping Pong Table" in attic are boards set on
packing boxes & bureau drawers.
Open Attic - roof full of holes.
Think rent should not be more than
\$90.00 or \$100.00 per month - This dwelling would
not rent for more than \$60.00 in ordinary
times - we have been forced to pay \$150.00
after searching for 6 months for a
place to live - Tenant on vital Defense Work

1. Unless otherwise notified by the Rent Director, you shall not pay more than the Maximum Rent as stated in Section C, Item 7, marked by an arrow (→), regardless of any lease or other agreement.
2. You are entitled to and should be receiving the equipment and services reported as included in the rent in Section D.
3. You may not be evicted for refusal to pay more than the Maximum Rent or for complaint or any other action which is authorized under the Maximum Rent Regulation.
4. Any agreement by you to give up the benefit of any provision of the Maximum Rent Regulation is void.

NOTE: If you sublet all or any part of this dwelling unit you must also file a Registration Statement.

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SECTION A. MAILING ADDRESS OF LANDLORD
Name of Landlord: 1000 N. Central Ave. McKinnis
Name of Agent: _____
Please Mail to: _____

Name of Landlord: John H. ...
Name of Agent: ...
Address Mail to: ...

TENANT'S COPY

1. 111 1st Street
Address of this rental dwelling unit

2. 111
Apartment number or location

3. Number of Rooms in unit being registered 8 + 1

4. Total Number of dwelling units in this structure 1

Name of Tenant Mrs. M. R. Van Name
Address 111 Oakmont Ave
City and State Richmond 14 Va

WARNING
his dwelling wait on and after the "effective"
more than the Maximum Work

(Signature of Landlord or his Agent)

Barbara McTear
(Signature of Landlord or his Agent)

(Testimony of Cyril Saroyan.)

Mr. Spohn: If your Honor please, may I ask permission to have a certified copy substituted for the original, inasmuch as this has been taken from——

The Court: It may be granted. You may withdraw the [27] original and substitute a certified copy in its place.

Any further questions?

Q. (By Mr. Cornish): Now, this rent was increased from \$110.00 to \$130.00, was it not?

A. That's right.

Q. And when was it increased?

A. On February 3, 1950, effective as of November 23, 1949.

Q. Now, the Wilsons moved out November 13, 1949, did they not? A. I don't know.

Q. You have no knowledge of that?

A. No.

Q. Was there any, or is there anything in your file which indicates that there was any substantial change in the rental value of this property between the 13th of November, 1949, and the 23rd of November, 1949?

A. Well, what were those dates, again?

Q. The 13th of November, 1949, and the 23rd of November, 1949.

Mr. Spohn: I object to that as calling for the conclusion and opinion of the witness.

Mr. Cornish: I am asking if his records show.

The Court: Just a moment, Mr. Spohn, there

(Testimony of Cyril Saroyan.)

hasn't been any statement of appearance in the record of your associate counsel.

Mr. Spohn: R. C. Yount, associated with me in the presentation of the government case. [28]

The Court: So that the record will be clear, do the records show anything, Mr. Saroyan?

The Witness: The records merely show a petition filed by the landlord on November 23, 1949, asking for a rental adjustment, with a lot of facts and figures.

Q. (By Mr. Cornish): And the rent was increased to \$130.00 from \$110.00?

A. That is correct.

Q. Is there anything in your file, Mr. Saroyan, that indicates that during the last three months that the Wilsons occupied that property, that \$130.00 would have been an unreasonable rent to pay?

Mr. Spohn: It's beyond the point.

Mr. Cornish: It is material to the matter of restitution, your Honor, regardless. There is a technical rule that the rent is frozen at a certain figure and that it is unlawful to collect more, but at the same time they are asking for restitution.

Now, restitution must be determined, in part, upon whether or not there has been an unreasonable rental charge. If these people have received value and have actually received \$135.00 worth of rental accommodations, there is no reason for making any restitution.

The Court: The objection is sustained because

(Testimony of Cyril Saroyan.)

that goes clearly into the question of the jurisdiction of the Area Rent [29] Control Office or officer, and the remedy is set forth in the statute, and this court is not going into that phrase of the matter.

Now, if there are any equitable defenses to the relationship between the tenants and the landlord, then this court will hear those, but insofar as the proceedings that the government has taken, this court simply is not going to have a complete judicial review of the administrative proceedings before that board.

Mr. Cornish: No, I am not seeking a complete review of the administrative proceedings. My point is that the government has filed this action seeking equitable relief. They have come before this Court as a court of equity, and they are, in substance, saying that during the period which the law prohibits this tenant from recovering anything, that this tenant has been so imposed on that it would be unjust and it would be inequitable to permit the defendants to keep the difference between \$110.00 and \$135.00.

Now, it is our contention that if a reasonable rent, regardless of what the frozen rent was, if a reasonable rent was \$130.00 or \$135.00 per month, it would be unreasonable to compel these landlords to make restitution of \$25.00 per month if a fair rent would be \$20.00 in excess of what the O.P.A. fixed. It is not a matter of reviewing the validity of the decisions of the Area Rent Office; it's a mat-

(Testimony of Cyril Saroyan.)

ter of determining what is fair to make [30] restitution.

The Court: That is just the question on fixing the rents, the rent ceilings, in these cases. That is the function of the Area Rent Control officer; and besides that, this question calls for an opinion and conclusion that this witness is not entitled to give, and on that additional ground, I am going to sustain the objection.

Mr. Cornish: I am asking him if there is anything in his file that indicates it; that's all.

Mr. Yount: I will object to that as incompetent and immaterial.

The Court: Just a moment. The matter has been objected to.

Mr. Cornish: And ask him if there is anything in the file that calls for his opinion.

The Court: You have had a chance to look at the file.

Mr. Cornish: May I put it this way?

Q. Is it not a fact, Mr. Saroyan, that there is nothing in the file that would throw any light upon the question as to whether or not any reasonable rent during any of this period was in excess of or less than or equal to the rent of \$110.00 per month which was fixed——

Mr. Yount: Objected to on the same ground. The order was issued. Whatever is in the file cannot change the force and effect of the order.

Mr. Cornish: I would like to be heard on that before your [31] Honor rules.

(Testimony of Cyril Saroyan.)

The Court: You may.

Mr. Cornish: This is an action in equity which is brought by the federal government, and I am attempting to show that this is an action which has been ill-considered by the federal government, that if the federal government had gone into the facts of this case, they would have determined that it would have been unjust and inequitable to ask for restitution to be made if they had inquired into all the facts, and I think I have the right to show that he made no inquiry into the facts, but has proceeded on the cold assumption that there was a frozen rent of \$110.00; that there was rent paid of \$135.00, therefore there should be a payment made to the tenant, but unfortunately the statute of limitations bars that recovery, so we are not going to call this an action for the recovery of rents, an action of restitution, so we get by the statute of limitations. This isn't an action for restitution at all. The government isn't seeking to do equity for anybody; they are seeking to collect by subterfuge something that they wouldn't be able——

Mr. Spohn: I object most strenuously as a point of privilege the attack that is being made on the government's counsel.

The Court: Mr. Spohn——

Just a moment, now, gentlemen, we are not going to get into a heated argument on this point. I am going to rule on the objection and I am going to sustain the objection for the [32] same reasons that have been heretofore given. This field of question-

(Testimony of Cyril Saroyan.)

ing, or the area in which this question goes to, is the area that is covered by the administrative procedure.

Now, I am going to say to counsel, if you have any specific record that you wish to refer to in this file, and you desire to have the witness identify, and which record is material to these proceedings and you desire to offer it into evidence after identifying it with this witness, you may do so. But to ask this witness to give his opinion as to whether there is anything in this record that does this, or if there is anything in the record that does that, I am going to sustain the objections to it.

Now, you have had the chance to examine the file——

Mr. Cornish: Yes, your Honor.

The Court (Continuing) ——which he has testified from. If there is any specific document that you desire to refer to, and have the witness identify as being a document that is regularly kept by the government in this proceedings, and if you can show its materiality, you may proceed on that basis.

Mr. Cornish: All right.

Mr. Spohn: May I point out one thing, that this witness has already testified in his testimony in chief that there is nothing in the file, no record whatsoever, in the Area Rent Office, in this file here——

The Court: I am aware of that. [33]

Mr. Spohn (Continuing): ——showing any action by the defendants between the time that they

(Testimony of Cyril Saroyan.)

filed the original registration in September of 1944, until they filed the petition for adjustment on November 23, 1949. His testimony is there. What more can questioning bring out?

The Court: I am familiar with that record, Mr. Spohn, and you can argue it when the time for argument comes, and these objections, I hope, will be made with a statement of the grounds for your objection and the theory behind it.

Now, I sustain the objection and the ruling is going to stand.

Now, proceed, Mr. Cornish.

Mr. Cornish: Now, is it your Honor's ruling—just so I understand the Court, because I don't want to appear to be trying to get matters before the court that you have ruled against me on.

The Court: Yes.

Mr. Cornish: Do I understand that on the issue of restitution, that I cannot show anything which has a tendency to impeach the findings of the Area Rent Control that the \$110.00 was the proper rent?

The Court: That's right.

Mr. Cornish: All right. In other words, your Honor is ruling that so far as the issue of restitution is concerned, independent of attacking the validity—in other words, let's [34] say we come into court and we admit that we have overcharged; we admit that there is a valid maximum rent ceiling of \$110.00 per month, and we admit that we have collected \$25.00 per month in excess of that

(Testimony of Cyril Saroyan.)

and we admit it has been paid as rent, no defense on that standpoint at all——

The Court: Yes.

Mr. Cornish: Is it your Honor's contention that where the statute has run and they can't collect the money——

The Court: You mean where a period of time has expired?

Mr. Cornish: The one year's statute has expired, and they cannot collect that rent back, although we are wrong, they have lost their rights, that when they come in the back door——

The Court: That is under an action for damages by the government?

Mr. Cornish: Correct—is it your Honor's contention that when they do come in the back door and ask for restitution, that they may stand strictly upon the findings of the Area Rent Control and we are not privileged to challenge them and show that those findings are unreasonable for the purpose of showing that restitution should not be based upon an unreasonable determination?

The Court: That is exactly my theory, without a showing, that you have exhausted your administrative remedies.

Mr. Cornish: All right. In other words, now your Honor said I could refer to any specific document? [35]

The Court: Yes.

Mr. Cornish: There are two records in there where some field investigator has gone out and he

(Testimony of Cyril Saroyan.)

has listed on the record the rent charged for what in his opinion was comparable housing and he has apparently based his determination that \$110.00 per month is reasonable for this house, based upon the rent charged for what he calls comparable housing.

Now, I agree with your Honor that if we wanted to attack the validity of the order fixing the rent at \$110.00 per month, our remedy is administrative and has long since gone by the board, but would your Honor rule, if I should ask him about that, on the issue of restitution, that we are not privileged——

The Court: I will answer your question. I will anticipate your question and say that whether it is for restitution or whether it is an action for damages, I am not going to go behind the findings of the rent control officer as to whether or not they are regular on their face, and the record is here before us and the witness has testified and has introduced a certified copy of the order of the Rent Control Office, so that I am not going to permit questioning to go back of that.

Now, as to your dealings with the tenant, I am going to permit testimony on that to go to the equitable issues, but I am not going to sit here and as a court of equity review the proceedings of the Area Rent Control Office.

Mr. Cornish: May I then—for the purposes of the record, [36] I will drop this line of examination.

The Court: You may make your offer.

Mr. Cornish: I offer to prove that the deter-

(Testimony of Cyril Saroyan.)

mination made—and this is only on the issue of restitution——

The Court: I understand.

Mr. Cornish (Continuing): ——not on the issue raised by the pleading, but on the issue of restitution, we offer to prove that the determination by the Area Rent Control, that the maximum rent was \$110.00 per month, and their order reducing it from \$150.00 to \$110.00 was based upon erroneous findings of fact, unjust and unfair, and partial findings of fact; and to show that the reasonable rental at all times, from the time of the order of reduction up until the present time would have been \$135.00 per month, or in excess thereof.

The Court: You may make your offer, and the request to prove that, the matter set forth in your offer, is denied.

Mr. Cornish: No further questions.

Mr. Spohn: I have no further questions of this witness.

The Court: You are excused, Mr. Saroyan.

(Witness excused.)

Mr. Spohn: As the next witness for the plaintiff, I would like to call Mr. Bruce A. Wilson.

BRUCE A. WILSON

called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows: [37]

Direct Examination

By Mr. Spohn:

Q. Would you state your name to the Court for the record? A. Bruce A. Wilson.

Q. What is your present address, Mr. Wilson?

A. 26 Glen Alpine Road, Piedmont.

Q. What is your occupation?

A. I am in the wholesale jobbing business.

Q. In San Francisco? A. Yes, sir.

Q. Were you formerly a tenant at 111 Oakmont Avenue, Piedmont? A. That is correct.

Q. Do you recall what period you were a tenant at those premises? Do you remember when you went there in the first place?

A. From July of 1946 until the 7th of November, 1949.

Q. From whom did you rent those premises? Do you recall? By that I mean, who was the landlord from whom you rented the premises on Oakmont Avenue?

A. Mr. and Mrs. McKittrick.

Q. Mr. and Mrs. Donald McKittrick, the defendants here? A. That's right.

Q. Do you recall how you first learned that those premises were available for rent?

A. Mrs. Wilson was making a canvass of the real estate offices and got in contact with it through

(Testimony of Bruce A. Wilson.)

a woman who was an agent for [38] it, W. A. Radford Company, in Oakland.

Q. They are real estate agents?

A. I believe.

Q. Mrs. Wilson is here today?

A. Yes, sir.

Q. Were you with Mrs. Wilson when she first interviewed the defendants, or when she rented the premises? A. Yes.

Q. Was there anyone else present?

A. No.

Q. Do you recall about when you and Mrs. Wilson rented the premises, shortly before you moved in, in July of 1946?

A. Well, I can identify it by the checks.

Q. Now, it was shortly before you moved in?

A. Yes, a few days.

Q. Now, when and where did you and Mrs. Wilson interview or talk with the defendants, Mr. and Mrs. McKittrick, about renting the premises at 111 Oakmont Avenue?

A. Oh, on two occasions, both in Walnut Creek.

Q. Where in Walnut Creek?

A. At their home.

Q. At the McKittrick home?

A. That is correct.

Q. Now, was there anyone present in addition to yourself, your wife, and the two defendants?

A. For a short time, the McKittrick's [39] daughter.

Q. The McKittrick's daughter. Now, do you

(Testimony of Bruce A. Wilson.)

recall the negotiations that you had for the rental of the premises on that occasion?

A. I believe so.

Q. Do you recall asking what the rent was for the premises? A. Yes.

Q. And do you recall what the answer was?

A. Yes.

Q. And who gave you the answer?

A. I am not sure whether it was Mr. or Mrs. McKittrick.

Q. And what did they tell you the rent was on the premises?

A. They said the rent had been \$110.00 and that they had a telephone authority from the OPA, which I believe was the agency at that time, to raise the rent to \$135.00.

Q. Now, did they then charge you \$135.00?

A. No, they asked that the difference between \$110.00 and \$135.00 be paid in a single check, so that they could go through the necessary paper work that would finally bring about the rent control.

Q. Now, did you make the payment in the fashion that they asked? A. Yes.

Q. How did you pay that, by cash or check?

A. In two checks, one for \$300.00, and the check for \$110.00.

Q. Do you have that check for \$300.00? [40]

A. Yes, I do.

Q. May I see it? (Handing the check to Mr. Spohn.) A. That is the three hundred.

(Testimony of Bruce A. Wilson.)

Q. Yes.

Mr. Spohn: I should like to offer in evidence as Plaintiff's Exhibit next in order the check for \$300.00, dated July 11, 1946, to the order of B. J. McKittrick, drawn by Bruce A. Wilson, on the American National Bank and Trust Company of Chicago, which has just been offered by the witness and seen by the defendants and their counsel.

The Court: The check will be admitted into evidence as Plaintiff's Exhibit 2.

(A check in the amount of \$300.00, dated July 11, 1946, was received in evidence and marked Plaintiff's Exhibit No. 2.)

PLAINTIFF'S EXHIBIT No. 2

[Check]

Bruce A. Wilson
208 S. La Salle St.

No. 305

Chicago, Ill., July 11, 1946.

Pay to the

Order of

D. S. McKittrick

\$300.00

Three Hundred and 00/100.....Dollars

To

American National Bank
and Trust Co.
of Chicago

/s/ BRUCE A. WILSON

(Testimony of Bruce A. Wilson.)

[Back of Check]

[Endorsed]:

/s/ D. S. McKITTRICK

[Stamped]: S. F. Clearing House, Berkeley Main
Office 90-41

Prior endorsements guaranteed.

American Trust Co., S. F., 11-24, July
18, 1946.

[Stamped]: Paid through Chicago Clearing House
July 19, 1946.

The First National Bank of Chicago
2-1

Q. (By Mr. Spohn): Now, about the rental, Mr. Wilson, I believe you have testified that there was this \$300.00 payment, and then there was a separate payment of rent; is that correct?

A. Yes, sir.

Q. Now, did you pay the separate—or make the separate payment at the same time?

A. Yes, sir.

Q. Did you make that by check, also?

A. Yes, sir.

Q. Do you have that cancelled check?

A. Yes, sir. [41]

(Handing a check to Mr. Spohn.)

The Court: Counsel, in order to get this matter correct now, as I understand it, Mr. Cornish, you

(Testimony of Bruce A. Wilson.)

admit that in your pleadings, I take it, and in the interrogatories that followed it, that a check for \$300.00 was delivered, and a separate check for the amount of the rent was also delivered?

Mr. Cornish: Yes, that is admitted.

The Court: And you don't have to produce these instruments to establish that fact. That is a check in the amount of how much?

Mr. Spohn: One hundred ten.

The Court: For the monthly rent?

Mr. Spohn: Yes, and what I wanted to do was to show the separate payment of the \$300.00 in one transaction, and then the monthly payments in checks for one hundred ten.

The Court: You will stipulate to that?

Mr. Cornish: What is the date of that check?

Mr. Spohn: July 11, 1946, the same date as the other check. In fact, if you will notice, it bears the next number from the check book. In other words, the one hundred ten dollar check was dated July 11, 1946, No. 304. The \$300.00 check dated the same day, No. 305, from the tenants' check book.

Mr. Cornish: Yes.

The Court: You will stipulate to that, will you not, Mr. Cornish? [42]

Mr. Cornish: Sure.

The Court: Then, it is not necessary to admit the documents into evidence.

Q. (By Mr. Spohn): Mr. Wilson, did you enter into any written agreements with the defendants for the rental? A. Yes, we signed a lease.

(Testimony of Bruce A. Wilson.)

Q. Do you have that lease with you?

A. I do.

The Court: Well, now, a lease is annexed to the interrogatories in the exhibit. Is this the original copy?

Mr. Spohn: I want to make certain that it is.

The Court: All right, you may. It is annexed to the answer to the interrogatories.

Mr. Cornish: This is not exactly a copy.

Mr. Spohn: Is this the lease that you received from the tenants?

The Court: If there is any problem about it, put it into evidence.

Mr. Cornish: I will say this, your Honor, that the lease was executed in triplicate, and there are certain minor deviations in the two copies.

The Court: You may point them out, but this witness can identify this document.

Mr. Cornish: There is no doubt, your Honor, but that that is an original. We don't doubt that that is an original. [43]

Mr. Spohn: May I offer in evidence as Plaintiff's Exhibit next in order——

The Court: Plaintiff's Exhibit No. 3.

Mr. Spohn (Continuing): ——a copy of the lease produced by the tenants?

The Court: It may be admitted as Plaintiff's Exhibit No. 3.

(A lease of premises was received in evidence and marked Plaintiff's Exhibit No. 3.)

(Testimony of Bruce A. Wilson.)

PLAINTIFF'S EXHIBIT No. 3

[A lease of premises similar to Exhibit A attached to Answers to Interrogatories filed Oct. 28, 1950. See pages 27 to 30 of this printed record. The following renewal is an addition to the original lease in Plaintiff's Exhibit No. 3.]

July 13, 1947.

This lease is hereby renewed on the same terms as contained above from July 13, 1947, to July 13, 1948.

/s/ D. S. McKITTRICK,

/s/ BRUCE A. WILSON.

Filed December 28, 1950.

The Court: Now, then, Mr. Cornish, if there are any material differences that you desire to point out, you may do so on cross-examination; or if you can get together and stipulate on it, why, that is satisfactory with the court if you believe that the differences are material.

Mr. Spohn: May I ask the witness one question?

Q. Did you make any changes on this copy of the lease that you received from the defendants?

A. I wrote at the end of the lease which continued it from July the 13th, 1947, to July 13, 1948.

Q. That is the renewal?

(Testimony of Bruce A. Wilson.)

A. That is in my own handwriting; that is correct.

Q. Did you make any other changes?

A. No, none whatever.

Q. Well, then, I will get to that point in the line of questioning.

Under this lease, Mr. Wilson, I notice that it provides [44] a term of one year, commencing July 13, 1946, to July 13, 1947, for a rent in the sum of \$1,320.00 payable monthly in advance on the 15th of each month. There are certain other provisions written, in longhand, and a written statement to the effect, "Receipt is hereby acknowledged of \$110.00, which constitutes the first month's rent under this lease."

Mr. Spohn: I believe it has been stipulated, or if not, I will ask the tenant:

Q. Did you pay the monthly rent of \$110.00 each and every month during that year?

A. Successively, yes, sir.

Mr. Spohn: And it has been stipulated that that is a fact?

Mr. Cornish: Yes.

The Court: That is the admitted fact in the pleadings.

Mr. Cornish: That he paid one hundred ten a month for each of the months in this term. In fact, that is where we differ from your statement that you claim your schedule included all the payments of rent made, and admitted those payments of \$110.00 a month.

(Testimony of Bruce A. Wilson.)

Mr. Spohn: Then, there is no question about the payment of the \$110.00 a month during this year?

The Court: No.

Mr. Spohn: All right.

Q. I notice on the copy of the lease which is in evidence for the plaintiff, a hand-written statement dated July 13, 1947, [45] reading:

“This lease is hereby renewed on the same terms as contained above, from July 13, 1947, to July 13, 1949.”

With two signatures, one of which appears to be D. S. McKittrick, and the other, Bruce A. Wilson. I ask you whether or not that is the statement that you, just a moment ago, mentioned as having made?

A. Yes.

Q. And that is your signature?

A. That is correct.

Q. Was that signature by D. S. McKittrick made in your presence? A. No.

Q. It was not? (Showing document to Mr. Cornish.)

The Court: Well, now, since there is a problem there, Mr. Cornish, do you stipulate that that is Mr. McKittrick's signature?

Mr. Cornish: Yes, your Honor.

Q. (By Mr. Spohn): Now, during the months commencing July 13, 1947, under the renewal of the lease, what rent did you pay?

A. One hundred thirty-five.

Q. Did you pay \$135.00 each and every month?

A. Uh-huh.

(Testimony of Bruce A. Wilson.)

Mr. Spohn: Is that stipulated? [46]

Mr. Cornish: We so answered in our interrogatory, didn't we? You understand my stipulation is that he paid \$135.00. I don't stipulate he paid that as rental.

The Court: I will accept that qualification of your stipulation. He paid \$135.00 every month. For whatever purpose it was, is a question to be determined yet.

Mr. Cornish: That's right.

Q. (By Mr. Spohn): Now, going back, there was a change, was there not, Mr. Wilson, from one hundred ten, during the first year, to \$135.00 during the second year?

A. I assumed that in paying the three hundred, that the rent control thing had gone through, and automatically at the end of the year I started the payment of \$135.00 by check per month.

Q. Was there any discussion about the difference of paying \$110.00 as against \$135.00?

A. None whatsoever.

Q. Did you discuss that matter with the defendants at the time you entered into the renewal of the lease? A. No.

Q. Then, is it your testimony that beginning with the second year and thereafter, you simply paid \$135.00? A. That is correct.

Q. Was there any agreement or any statement ever prepared in writing that \$300 a month payment that you made in the first place, that \$300.00 lump sum payment? A. No, sir. [47]

(Testimony of Bruce A. Wilson.)

Q. Was there ever any written statement providing for a change of monthly payments from one hundred ten to one hundred thirty-five?

A. No.

Q. Was there ever any discussion on paying one hundred thirty-five rather than one hundred ten plus a \$300.00 as you did in the first instance?

A. None whatsoever.

Q. Have you received any refund from the defendants for any of the amounts that you paid them during the period that you were in occupancy of the premises?

A. No.

Q. Have you brought any private lawsuit on your own behalf to recover any of that money?

A. No, the only thing we did was, after we had left the house and had found that this condition existed, we wrote a letter asking them if they would care to make any restitution, and it was never replied to.

Q. When was that, after you had left the tenancy?

A. Yes.

Mr. Spohn: I have no further questions at this time of Mr. Wilson.

The Court: You may start your cross-examination. You may start to cross-examine now, Mr. Cornish. I presume you expect to take some period of time. [48]

Mr. Cornish: I think it will take a little time, your Honor. I would just as soon start. I can ask several questions before lunch, your Honor.

(Testimony of Bruce A. Wilson.)

The Court: Well, if you desire to, go ahead, proceed.

Cross-Examination

By Mr. Cornish:

Q. Mr. Wilson, you say you wrote a letter to Mr. McKittrick? A. I beg your pardon?

Q. You say you wrote a letter to Mr. McKittrick after you moved out? A. Yes, I believe so.

Q. Do you have a copy of it?

A. No, I don't.

Q. Do you remember what you said in that letter?

A. Only that we had learned that the rent had been excessive, and that we asked if they would care to do anything about it.

Q. How long after you moved out of the property did you write that letter?

A. I don't recall.

Q. You took a water color painting with you that belonged to the McKittricks, didn't you?

A. I have no knowledge of any paintings of any kind.

Q. Do you recall a water color painting that was in a frame? A. No, I do not.

Q. And you took the picture and left the [49] frame?

A. I have no recollection whatsoever of it.

Q. You took an etching that belonged to the McKittricks at the time you moved out, didn't you?

A. I never saw paintings or etchings of any

(Testimony of Bruce A. Wilson.)

kind that belonged to them. As a matter of fact, the furnishings of their house was stored in the attic and at no time did we ever touch them from the time we moved in until we moved out, with minor exceptions.

Q. What condition were the furnishings in the attic at the time you moved out?

A. I don't know.

Q. You made no investigation of them?

A. No, sir, nor did we when we went in.

Q. You moved some of the things up into the attic, didn't you, while you were there?

A. A few pieces that were downstairs in the first floor of the house, yes.

Q. And what condition were they when you moved out?

A. We moved the dining room rug which seemed to have some value, and actually sent it out and got it cleaned and put it in the attic.

Q. And what condition were those items when you left the house, the ones that you put up in the attic?

A. I don't know.

Q. You made no investigation to find out? [50]

A. There was on the rug that we put in the attic.

Q. Is that the letter that you are referring to, the letter that you wrote to Mr. McKittrick? (Handing a letter to the witness.)

A. That is correct; that is the letter.

Q. Now, when did you learn that the Rent Con-

(Testimony of Bruce A. Wilson.)

trol Board had not authorized an advance in the rent?

A. Some real estate man called us shortly after we had left the house and asked what we paid in rental, and I told him \$135.00, and he said, "Well, did you know that was \$110.00 property?" And I said, "No, I did not know that." With which we went down to the Rent Control Office and talked to Mr. Chambers to ask him what was the situation, after having written that letter.

Q. Now, when did you move out?

A. On the 7th of November, 1949.

Q. The 7th of November, 1949?

A. That is correct.

Q. And this letter that you have identified was written 7 days later? A. I presume so.

Q. How long after you moved out did this real estate man call you to talk about the rent?

A. Within a couple or three days, if I remember rightly.

Q. Do you remember the name of the real estate man? [51]

A. No, he didn't identify himself and I didn't ask him.

Q. Isn't it a fact that that inquiry from the real estate man was made after the 23rd of November, 1949?

A. No—I am pretty sure of that, because I had no knowledge that the condition existed.

Q. You knew all the time that you were in this

(Testimony of Bruce A. Wilson.)

property that there was a rent ceiling of \$110.00 per month, didn't you?

A. No, I knew at the beginning when we went into the property that they said that the rent ceiling was \$110.00, and that the OPA—that the OPA had given them a telephone approval for an advance in rent.

Q. All right. Now, this lease that you have identified provides for \$110.00 per month, doesn't it?

A. That's right.

Q. (Handing a document to the witness.): And you endorsed on the bottom of that, the statement:

“This lease is renewed on the same terms for one year.”

Or in substance to that, did you not?

A. I did.

Q. All right, now, why did you pay \$135.00 per month when your lease provides for \$110.00?

A. Well, the renewal of the lease, I didn't read it.

Q. You didn't read it?

A. Not the second time around, no. [52]

Q. Didn't you ever read it before you signed it?

A. I read it at the beginning, yes.

Q. And you knew it provided for \$110.00, didn't you? A. That's right, I did.

Q. All right, then, when it was renewed for a period of a year, you knew one hundred ten was provided at that time?

A. I don't believe I gave it a thought.

(Testimony of Bruce A. Wilson.)

Q. You knew you had made out a check for three hundred for advance payment of rent?

A. And we immediately started to pay the \$135.00, and I have the checks as evidence.

Q. And you knew that during all the year before, you were writing checks for one hundred ten?

A. Plus the \$300.00.

Q. You knew that each month you were writing a check for \$110.00, didn't you?

A. Of course.

Q. And you knew the lease provided for \$110.00?

A. Yes.

Q. All right. Now, then, isn't it a fact that at the time Mr. McKittrick signed that extension, that he told you that he wouldn't sign it unless you did pay an extra \$25.00?

A. There was no conversation whatsoever on the signing of the lease the second time. It was made out and mailed—it was mailed out and mailed [53] back.

Q. Isn't it a fact that you came to Mr. McKittrick and asked him for the extension for a year?

A. No, sir, it is not a fact.

Mr. Cornish: I would like to offer this letter in evidence, your Honor, before I get too far afield.

The Court: You may. It may be offered into evidence as Defendants' Exhibit B. Is that correct, Mr. Clerk?

The Clerk: That is correct, your Honor: Defendants' Exhibit B.

(Testimony of Bruce A. Wilson.)

(A letter dated November 14, 1949, was received in evidence and marked Defendants' Exhibit B.)

DEFENDANTS' EXHIBIT B

November 14, 1949

Mrs. Donald McKittrick
Box 39
Walnut Creek, Calif.

Dear Mrs. McKittrick:

We have just learned that the Rent Control Board did not authorize an advance in rent in the figure of \$110.00 quoted to us three years ago on the premises at 111 Oakmont Ave., Piedmont, California. We have also learned that at no time was there any consideration given to an advancement of of this rent. It was our understanding that this advance from \$110.00 to \$135.00 that we paid for three years was a routine matter that was then in the process of being completed.

We would prefer not to introduce any difficulties into the matter of the \$1,000.00 so would ask that you kindly return this overpayment to us by December 1st.

Yours very truly,

/s/ BRUCE A. WILSON.

#27 Glen Alpine Road
Piedmont, California

Filed December 28, 1950. [54-A]

(Testimony of Bruce A. Wilson.)

Q. (By Mr. Cornish): Now, were you introduced at the McKittricks? A. No.

Q. You went out to see them at Walnut Creek?

A. At the instigation of a real estate woman.

Q. The real estate woman told you where they lived? A. Yes.

Q. And they had never met you before you came to their house? A. That is correct.

Q. And you requested them to rent you the house? A. Yes.

Q. They didn't look for you?

A. No; they had listed it with the real estate people.

Q. How many times did you go out to their house before you [54] signed a lease?

A. Twice, I believe.

Q. How far apart were those two times?

A. One night.

Q. One night apart? A. I think so.

Q. You are sure it wasn't two nights?

A. It might have been.

Q. You said that you were told that the OPA had increased the rent to one hundred thirty-five?

A. I was told that they had approval by telephone from the OPA for an increase.

Q. All right. Now, the lease was first prepared to pay \$135.00 per month rent, wasn't it?

A. No, I don't believe so. I never saw any such document.

Q. That signature, Bruce A. Wilson, that I show you, is that your signature? A. Yes, sir.

(Testimony of Bruce A. Wilson.)

Q. And the signature Beatrice S. Wilson, is that your signature?

A. That is my wife's signature.

Q. Your wife's signature? A. Yes, sir.

Q. Now, I call your attention to the last three lines on that same page and ask you if you ever saw those before? [55]

A. I apparently did. I don't recall it, however. This is my initial signature on the side.

Q. Then, isn't it a fact that the first lease that was prepared was prepared to provide for rent at \$135.00 per month? A. I would presume so.

Q. All right. At the time you signed the lease, you signed a lease in duplicate, didn't you?

A. Yes.

Q. And this change down at the bottom on this page here where the figures one hundred thirty-five are stricken out and the figures one hundred ten written above, you initialed? A. I did.

Q. You saw that, then, didn't you?

A. I must have.

Q. When you read it? A. I must have.

Q. Now, on the face of this same document, the words sixteen hundred twenty, the sixteen is crossed out and a thirteen is written above. You also initialed that change, didn't you?

A. That is my initial, yes.

Q. All right, and isn't it a fact that the lease, when it was first prepared and shown to you, was drawn to require the payment of \$135 per month

(Testimony of Bruce A. Wilson.)

rent instead of \$110? A. I can't answer that.

Q. Isn't it a fact that, before you signed that lease, both [56] Mr. and Mrs. McKittrick advised you that they would not rent the property because they had found that the Area Rent Control would not let them charge more than \$110.00 per month rent? A. I don't recall any such statement.

Q. Why did you pay \$300.00 on a tenancy in advance and sign a lease to pay one hundred ten per month? A. Why did I?

Q. Yes.

A. For the reason that they *that* it would take some time to have the paper work accomplished in the O.P.A. and we would pay the difference in cash, which I agreed to do, and did.

Q. Didn't they tell you that the rent was \$110.00 per month when you moved in? A. No, sir.

Q. What did they tell you they were going to accomplish through the O.P.A.?

A. They said they had approval by telephone to raise the rent, and I didn't question the figure.

Q. All right, raise the rent from what figure to what figure?

A. I presumed from one hundred ten to one hundred thirty-five. That is what we paid.

Q. What did they tell you? They told you about asking the Area Rent Control for an approval. What did they tell you?

A. They told us that—no, that the O.P.A., if I remember rightly, had given them telephone approval in advance. [57]

(Testimony of Bruce A. Wilson.)

Q. Telephone approval of what?

A. Of an advance in rent.

Q. Advance from what to what?

A. I presumed——

Q. I am not asking you what you presume; I am asking you what you remember they told you?

The Court: Your best recollection.

The Witness: To one hundred thirty-five.

The Court: From one hundred ten to one hundred thirty-five?

The Witness: Yes.

The Court: Now, counsel, we have arrived at the noon hour. You may continue your cross-examination after noon.

Mr. Cornish: Can you, before adjournment, your Honor, have this document marked for identification?

The Court: You may have it marked for identification if there is no objection, and you want to introduce it into evidence, you may introduce it. You don't want to offer it at the moment?

Mr. Cornish: That is right.

The Court: All right, then, the document will be admitted and marked for identification as defendants' Exhibit C.

The Clerk: Defendants' Exhibit C for identification.

(The lease heretofore referred to was marked Defendants' Exhibit C for identification.) [58]

The Court: All right, then, at this time we will take our noon recess until the hour of 2:00 p.m.

(Testimony of Bruce A. Wilson.)

(A recess was taken until 2:00 o'clock [59] p.m.)

Afternoon Session—2:00 P.M.

(Bruce A. Wilson resumed the witness stand, having been previously duly sworn, and testified further as follows.)

Cross-Examination
(Continued)

The Clerk: United States versus McKittrick, et al., for trial.

Mr. Cornish: Ready.

Q. Mr. Wilson, showing you plaintiff's Exhibit 3, I call your attention to what is written on the top, written upside down on the top of page 2, July 13, and I will call your attention to this part. This is written upside down on top of the page, July, 1947, "This lease is hereby renewed on the same terms as contained above, from July 13, 1947, to July 13, 1948. You wrote that in your handwriting? A. Yes, sir.

Q. When did you write it?

A. Presumably July 13.

Q. I am not asking you "presumably." I am asking you when you wrote it?

A. It's dated July 13.

Q. When did you write it?

A. I don't know.

Q. Do you have any idea? A. No, sir.

(Testimony of Bruce A. Wilson.)

Q. Was it on, before, or after July 13? [60]

A. I don't know.

Q. You have no recollection?

A. No, sir. I dated it here, that's the only——

Q. May I refresh your recollection, Mr. Wilson, and ask you if it isn't a fact that you wrote that there three months after July 13, 1947?

A. I don't remember.

Q. Do you remember where you wrote it?

A. I presume I wrote it in my home.

Q. I don't care what you presume; I want to know if you remember where you wrote it.

A. No.

Q. To refresh your recollection, you wrote it at your home in Mr. McKittrick's presence, did you not?

A. Not to my knowledge.

Q. You don't recall that? A. No, sir.

Q. Isn't it a fact that at the time you wrote that, that you had already sent Mr. McKittrick three checks of \$135.00 each?

A. I don't remember that.

Q. You don't remember? A. No, sir.

Q. Would you say that you hadn't sent in three checks for one hundred thirty-five each when you wrote that?

A. I wouldn't say. [61]

Q. You can't say? A. No, sir.

Q. When did you put the date of July 13, 1947, at the top of that?

A. I don't know.

Q. Did you put it there before or after Mr. McKittrick signed it?

A. I don't know.

(Testimony of Bruce A. Wilson.)

Q. Isn't it a fact that you put it there after he signed it? A. No, I don't believe so.

Q. I am now showing you, Mr. Wilson, Defendants' Exhibit C for identification, and call your attention to a similar statement that appears on that, written upside down on the top of page 2, and ask you if the signature, "Bruce A. Wilson," is your signature? A. Yes, it is.

Q. And if the signature, "B. S. Wilson," is your wife's signature? A. So it appears.

Q. And it is a fact, is it not, that D. McKittrick and Barbara McKittrick signed their names in your presence? A. No, it is not so.

Q. They did not?

A. They did not sign it in my presence.

Q. Now, I call your attention to the fact that there is no [62] date on that. Can you tell me the date on which you signed the rider that is on Defendants' Exhibit C, for identification?

A. No, I have no knowledge of it.

Q. Were both the statement on the lease which you hold in your left hand, and on Defendants' Exhibit C for identification signed at the same time? A. No, I don't believe so.

Q. You do not? A. I do not.

Q. Would you say they were not signed at the same time?

A. To the best of my knowledge they were not signed at the same time.

Q. How far apart were they signed?

A. I don't know.

(Testimony of Bruce A. Wilson.)

Q. Were they signed on the same day?

A. I don't know.

Mr. Yount: I don't wish to interrupt counsel on cross-examination, but I can't see the relevancy of these questions. The fact that the amount of money was paid is admitted. Now, if he wants to cross-examine on circumstances relating to the original rental, that is one thing; but to go into these immaterial and irrelevant details when it is admitted that the money was paid, I object to on the grounds of relevancy and materiality, for lack of the same.

The Court: Objection overruled. Proceed. [63]

Q. (By Mr. Cornish): Were they signed on the same day? A. I don't believe so.

Q. You don't believe so. All right, were they signed on successive days?

A. I don't believe that, either.

Q. How many days apart were they signed?

A. I have no knowledge of it.

Q. What makes you think they weren't signed at the same time?

A. For the reason that I mailed it.

Q. You mailed it?

A. I mailed the lease with the codicil written on them.

Q. You mailed them to them for signature?

A. That's right.

The Court: Mr. Wilson, you mean the extension terms; not codicils.

(Testimony of Bruce A. Wilson.)

The Witness: Yes—I beg your pardon.

Q. (By Mr. Cornish): All right. Now, which one of those did you mail to them?

A. Well, the only one I had was the copy that was in my possession.

Q. And that is——

A. And I believe this one that you gave me first is the one that——

The Court: The witness is referring to—let me see the copy—now referring to Plaintiff's Exhibit No. 3. [64]

The Witness: I believe this is a copy of the lease which we had.

Q. (By Mr. Cornish): Now, had you signed your name, Bruce A. Wilson, on the extension on Plaintiff's Exhibit 3 at the time that you mailed it to Mr. McKittrick?

A. That, I wouldn't remember.

Q. You don't remember that? A. No.

Q. All right. Which one of these did you sign first, if they were signed at different times?

A. I don't know; I would think this one.

Q. You mean, Plaintiff's Exhibit 3?

A. I would believe so; I am not sure.

Q. And do you recall where you signed the extension on Plaintiff's Exhibit 3?

A. No, probably in my home at my desk.

Q. Do you recall where you signed the extension written on Defendants' Exhibit C for identification? A. No, I don't.

(Testimony of Bruce A. Wilson.)

Q. Did you and your wife sign at the same time? A. I don't remember.

Q. Was Mr. McKittrick present when you signed? A. No, there was no one present.

Q. Are you sure of that?

A. Yes, sir. [65]

Q. Now, you don't recall how many rent checks of \$135.00 a month you had sent at the time that your signature was affixed to those two extensions?

A. No, I do not.

Q. You don't even recall whether you had sent any checks? A. No, I don't.

Q. You are positive now you are giving us your best recollection? A. Yes, sir.

Q. You are not concealing anything?

A. I don't believe so.

Q. All right. Now, Mr. Wilson, going back to the time when you first signed this lease, first made this agreement with the McKittricks, you came to their house on two occasions?

A. Are you asking me?

Q. Is that not a fact? A. Yes.

Q. And on the first occasion no papers were signed?

A. I don't believe so. That's right.

Q. And did Mr. McKittrick tell you, or Mrs. McKittrick, either one of them, on the first occasion, that they would rent you the house?

A. No, they did not.

Q. Do you recall what the last thing you said in that conversation was as you left the house? [66]

(Testimony of Bruce A. Wilson.)

A. Do I recall? No.

Q. Isn't it a fact, Mr. Wilson, that the last thing you said was, "Please, Mr. McKittirek, rent us your house"? A. I don't remember that.

Q. You don't remember that? A. No.

Q. Would you say you didn't make that statement?

A. Yes, because that's not my formal way of talking.

Q. Then, on the second occasion, did you make out the check the first day you came?

A. No, sir.

Q. Will you explain to me, Mr. Wilson, why your check is dated the 11th of June, and the lease is dated the 11th of July—and the lease is dated the 13th of July?

A. No, I don't know that, except that if my memory serves, the lease was to be prepared and sent to us.

Q. You didn't sign the lease, then, in Mr. McKittrick's presence?

A. I can't recall. I don't know whether that first lease was signed in their presence or not.

Q. You do recall, however, initialing certain changes? A. Wait a minute, may I—

The Court: Yes, you may.

The Witness: I believe that we did sign a lease, which I would assume to be the one that you showed me this morning, which [67] is the one that has the crossed-out marks. I believe that was signed on

(Testimony of Bruce A. Wilson.)

the second day or evening, rather, that we saw the McKittricks, but later, a copy to me was substituted without that same information in it, or, that is, without the corrections made on it.

Q. (By Mr. Cornish): In other words, to straighten out the record, Mr. Wilson, you signed Defendants' Exhibit C for identification and——

A. I think so.

Q. (Continuing): ——and Plaintiff's Exhibit 3 was mailed to you afterwards?

A. That's to the best of my recollection, yes.

Q. Then, at the time that you left the conference when the lease was signed, you didn't have a copy of the lease in your pocket? A. No, sir.

Q. Now, was this lease dated the same day that you signed it? A. That, I don't know.

Q. You didn't check the date of the 13th?

A. No, I did not.

Q. I call your attention to what appears to have been a correction on the 13th, at the top of page 1 of Defendants' Exhibit C for identification, and also in two places at the bottom. A. Yes.

Q. And I will ask you if you know when those corrections were [68] made?

A. I have no idea. They were not in my writing and I had nothing to do with them.

Q. Were they made before or after you signed it? A. I don't know.

Q. How long after you signed the lease was it before you moved in?

A. Perhaps Mrs. Wilson can answer it; I can't.

(Testimony of Bruce A. Wilson.)

Q. You don't recall? A. No.

The Court: Do you know when you moved in?

The Witness: Not specifically, by date, no.

Q. (By Mr. Cornish): Did you make out the check for \$300.00 before or after you signed the lease?

A. I don't know. We made the check out, the two checks out, the second time we saw them.

Q. The second time?

A. That's right. Now, whether or not that was before or after the lease was signed—I would believe it would be before.

Q. Were those checks dated the day you made them out? A. I suppose so.

Q. Were they or weren't they?

A. I wouldn't have any way of knowing. You don't usually check a check other than the date you are writing it.

Q. That is why I am asking you if it was dated the day you wrote it. [69]

A. I can't answer it.

Q. Now, I am calling your attention to Plaintiff's Exhibit dated July 11, and Plaintiff's Exhibit 3—Defendants' Exhibit C for identification, which is dated July 13, and I will ask you which of those dates is correct as the date upon which you signed the lease and mailed out the check, July 11, or July 13?

A. I can't answer it. I am rather positive that I made the check out on July 11. As to what the date the lease was signed, I have no way of knowing.

(Testimony of Bruce A. Wilson.)

Q. But you didn't make out the check before the day you signed the lease, you know that?

A. I beg your pardon?

Q. You did not make the check out the same day on a date previous to the day you signed the lease?

The Court: Do you understand the question?

The Witness: Yes, I do. This involves the question of which lease.

Q. (By Mr. Cornish): The one you are holding in your hand, Defendants' C for identification.

A. I am of the impression that this original lease with its corrections was signed at the same time—evening that we signed the check.

The Court: That is the best recollection you have?

The Witness: Yes, but my copy of the lease was not signed [70] until later. How much later, I don't know.

Q. (By Mr. Cornish): Isn't it a fact, Mr. Wilson, that you deliberately dated the check two days before the day it was written? A. No.

Q. That is not a fact? A. No, sir.

Q. Then, if there is any discrepancy in the dates, it was purely accidental in either the mistake in the day of the lease and mistake in the date of the check, whichever it might be, when it was delivered? A. No, sir.

Q. Now, when did you first hear that there was a ceiling price fixed by the Area Rent Control of

(Testimony of Bruce A. Wilson.)

\$110.00 a month on the property at 111 Oakmont Avenue?

A. Some few days after we moved out and were telephoned by a real estate man.

Q. That's the first time you heard of it?

A. First time I heard that the paper work which was indicated to us in 1946 had not been completed.

Q. What did you think, Mr. Wilson, month after month, when you were making out checks for \$135.00 rent and the lease called for one hundred ten?

A. I don't know that I ever gave that any conscious thought, but I assumed that the paper work that was represented to us [71] would be done—had been done—and that the legal rent was \$135.00.

Q. You knew that your lease called for \$110.00, didn't you? A. Yes, that's right.

Q. And you knew it was renewed on the same terms? A. That is correct.

Q. All right. Now, why did you send a check for \$135.00 when you had signed an agreement to pay one hundred ten?

A. Because we had been paying one hundred thirty-five right along.

Q. You hadn't given Mr. McKittrick one check for \$135.00 at the time this lease was extended, had you?

A. That is correct. I had given him 12 checks for one hundred ten, and one check for three hundred.

Q. Now, you told me a minute ago you didn't

(Testimony of Bruce A. Wilson.)

remember whether you had given him any checks for one hundred thirty-five. Now, you say you don't know. Which is correct?

The Court: Just a moment, counsel, I don't recall that that is his testimony; and the question is argumentative in its form.

Mr. Cornish: All right.

Q. How many checks for \$135.00 per month—how many checks for \$135.00 had you given Mr. McKittrick when the extension agreement was signed on those two leases?

A. That is the same question I said I couldn't answer. [72]

Q. You couldn't answer?

A. That is correct.

Q. Now, then, you just said about half a minute ago that you had only given him 12 checks for one hundred ten, and nothing more except the \$300.00 check. Now, which is correct, that you can't answer it, or that you hadn't?

A. I don't understand the question.

Q. Had you ever given Mr. McKittrick a check for \$135.00 before the extension agreement was signed?

A. I have repeatedly said I did not.

Q. You did not. All right. You knew when the extension agreement was signed that the lease called for \$110.00?

A. Yes, I knew that.

Q. Now, why did you make out a check for \$135.00?

A. Because we had, in effect, been paying that

(Testimony of Bruce A. Wilson.)

consistently and that I assumed that, as I say, the paper work on the basis of their representation to us that they had been granted an increase by the O.P.A. and that it had gone through. I didn't ask questions about it.

Q. You made no inquiry at all?

A. Not the least.

Q. You were perfectly willing to pay an extra 25 months' rent?

A. I don't believe—I am not perfectly willing to pay anything. What I did was to pay a continuance of what we had been paying on what we assumed to be a representation that the paper [73] work had been completed.

Q. You had paid \$300.00 in one chunk; you had never paid one hundred thirty-five, had you?

A. I think that is quibbling.

Q. Had you?

A. No, we paid \$110.00 plus three hundred.

Q. You didn't pay another three hundred when you renewed the lease for another year?

A. No, I simply added it to the one hundred ten and paid it in that form.

Q. Did you discuss the adding of that \$25.00 to the one hundred ten each month with Mr. or Mrs. McKittrick before you did it?

A. No, sir.

Q. Did they ever ask you to add it?

A. No, sir.

Q. In other words, nobody ever asked you for any more than \$110.00 a month rent all the while

(Testimony of Bruce A. Wilson.)

you were there except for the original \$300.00 check? A. No, no one ever asked that.

Q. And you never objected to paying it?

A. No, on the assumption that this O.P.A. ruling had been completed.

Q. Now, you know nothing about the condition of any of the furniture up in the attic, either what was in there before you [74] moved in or what you put up there yourself at the time you left?

A. That is essentially correct.

Mr. Cornish: I have no further questions.

The Court: And further examination?

Mr. Spohn: Just one question.

Redirect Examination

By Mr. Spohn:

Q. When you first rented the place in July of 1946, Mr. Wilson, what rent was specified for the premises? A. \$135.00 per month.

Q. And you have previously testified as to the circumstances under which you paid that in two separate amounts? A. That's right.

Q. There was a check for \$300.00?

A. That's right.

Q. Plus 12 monthly checks of one hundred ten?

A. As we understood it, we were to pay the \$300.00, anticipating that the paper work would be completed following this so-called phone conversation of authority to increase, and that until such time as the paper was done, it would be \$110.00 per

(Testimony of Bruce A. Wilson.)

month, and we were to pay the premium of \$300.00 which would be legalized by the paper work form. Now, that is my best memory of it.

Q. One further question: You have been shown two lease forms, one is Plaintiff's Exhibit 3, which you had in your possession, and the other is Defendants' C for identification, which was [75] produced this morning by counsel for the defendants?

A. Yes.

Q. And on the latter one, that is, the one that the defendants produced, there are some changes made as to the amount of rent, which bear two initials, one of which you have identified as your own?

A. That is correct.

Q. Do you recall any discussion at the time those changes were made and you initialed the form?

A. No, I don't exactly, except the situation which I have just explained on the basis of your present question—your last question—but in detail, no, sir.

Q. Okay.

Mr. Spohn: I have no further questions.

The Court: Any further cross-examination?

Mr. Cornish: No, your Honor.

The Court: That is all, Mr. Wilson. You may step down.

(Witness excused.)

Mr. Spohn: May I speak to Mr. Wilson a moment?

The Court: Yes, you may.

Mr. Spohn: I would like to call Mrs. Beatrice Wilson.

The Court: All right.

BEATRICE WILSON

called as a witness in behalf of the plaintiff, having been duly sworn, testified as follows: [76]

Direct Examination

By Mr. Spohn:

Q. Would you state your name to the Court?

The Court: Before you start questioning Mrs. Wilson, Mr. Spohn, in order to see that the record is accurate, Mr. Wilson has testified as to the \$300.00 payment, and then the \$110.00 monthly payments for \$713.46 through 7/13/47.

Mr. Spohn: There were 12 monthly payments.

The Court: Twelve monthly payments of \$110.00, and then for the payment of \$135.00 a month, for the extension period, which I understood was one year, the first extension.

Mr. Spohn: That's right and thereafter.

The Court: Now, that would take us through 7/13/48?

Mr. Spohn: Yes.

The Court: Item II of the complaint in the schedule attached to the complaint carries us down to 11/13. Now, rather than recalling Mr. Wilson to the witness stand, since counsel has already stipulated that the payments from 7/13/47 through the extension period of one year had been paid at the rate of \$135.00 a month, is it also stipulated that,

(Testimony of Beatrice Wilson.)

to and including 11/13/49, that \$135.00 a month was paid?

Mr. Cornish: Up to the time that Mr. Wilson vacated the premises, your Honor, it is stipulated that each month he sent a check for \$135.00.

The Court: All right. He vacated, I understand, on November 7? [77]

Mr. Cornish: It is stipulated that the defendants received the money and cashed the check.

The Court: All right, then, the record is complete.

Q. (By Mr. Spohn): Mrs. Wilson, you are the wife of Bruce Wilson who just finished testifying, and you were with him in the various transactions that he related concerning the rental of the premises at 111 Oakmont Avenue? A. Yes.

Q. During the course of his testimony, at the outset, in response to a question as to how you and he learned of the availability of this house for rental, I believe your husband testified that you had been canvassing the market and you were informed by a real estate agent that this house was available? A. Yes.

Q. Is that correct? A. That's right.

Q. Do you recall any of the circumstances of that happening? By that, I mean, do you recall the real estate agent from whom you received this information? A. Oh, yes.

Q. What was the name?

A. I don't remember her name, but it was the Radford Company.

(Testimony of Beatrice Wilson.)

Q. The Radford Company?

A. Yes, it's at Leslie Street, Lakeshore and Trestle Glen.

Q. Where? [78] A. In Oakland.

Q. In Oakland?

A. Yes. I paid them a commission.

Q. Oh, you did? A. Oh, yes.

Q. Do you have the check for that?

A. Mr. Wilson has it.

Q. Is this the check to which you referred?

A. I think so; I have to get my glasses. Yes, indeed.

Mr. Spohn: I offer in evidence as Plaintiff's Exhibit next in order, a check dated July 30, 1946, drawn on the American National Bank and Trust Company of Chicago, to the order of W. A. Radford Company, in the amount of \$66.00, signed by Beatrice S. Wilson.

Mr. Cornish: To which we object on the ground that it is incompetent, irrelevant and immaterial, and not within the issues of the case, and not binding upon the defendants.

Mr. Spohn: If your Honor please, I think I can establish the relevancy of the exhibit.

The Court: Well——

Mr. Spohn: It deals with the transaction that is at issue here.

Mr. Cornish: I think your Honor should sustain my objection until he establishes the relevancy, and not place on me the burden of making a motion

(Testimony of Beatrice Wilson.)

to strike it if he fails to do it. [79]

The Court: Well, what is the binding effect upon these defendants here?

Mr. Spohn: It runs directly, if your Honor please, to the curious contention made that these tenants induced the defendants to forego their privileges as owners, from occupying the premises. In other words, this indicates that the house was on the rental market and was so found by the tenants, and the check indicates the payment for the representation performed by the real estate agent, and that will go directly to the willful issue here on which we predicate our claim to damages.

The Court: Well——

Mr. Cornish: May it please your Honor——

The Court (Continuing): ——just a moment, Mr. Cornish. I think at the moment, your objection is sound. I am going to sustain it at this time. I think, Mr. Spohn, you are anticipating a defense that hasn't been made. In other words, it may be proper rebuttal, but it is not——

Mr. Cornish: In fairness to your Honor, I will state that our proof will disclose that this house was on the rental market and that it was listed with various real estate brokers, among others, the Radford Company for \$110.00 per month rent. Now, what arrangements these people made with Radford, we know nothing about. Whether the Radford Company earned a commission or whether he paid one or didn't is nothing to us. We didn't deal

(Testimony of Beatrice Wilson.)

with Radford, except that it was listed, and we don't deny [80] that they found out about it through the Radford Company, but we never had any dealings with the Radford Company directly in connection with this particular transaction, nor did we have anything to do with what they paid Radford. We paid Radford no commission.

The Court: Counsel, if the statement of Mr. Cornish were made in the form of a stipulation that it was listed on the market and that Radford was one of the companies through which it was listed, if that were put in the form of a stipulation, would that satisfy you?

Mr. Cornish: That is, it was listed at one hundred ten a month?

Mr. Spohn: If you will stipulate that the property was listed with the Radford Real Estate Company for rental.

Mr. Cornish: It was listed with Radford and several others; there is no doubt about that, and listed at \$110.00 per month. Now, whether Radford took 60 per cent of the first month's rent or whether on the basis of half of what the first month's rent was, I don't know. I don't know how they computed that. In fact, I never heard of a commission being paid for renting it until just today.

The Court: The point is, Mr. Spohn, with the additional fact that it was listed at \$110.00 per month, are you still willing to accept that as a stipulation?

(Testimony of Beatrice Wilson.)

Mr. Spohn: Yes, we will take it. [81]

The Court: Yes, it will, then. It is so stipulated; and did you desire, then, to introduce this check into evidence at this time?

Mr. Spohn: Well, in view of that, I believe I will. I am not going to offer it or press the point at this juncture of the case.

The Court: Yes.

Mr. Spohn: I think, following your Honor's suggestion that if it should become more important as the trial develops, that we should then take it up. However, I want to make the point on this proposition that counsel has offered about the listing at \$110.00. I am not in a position—I don't know what——

The Court: You are not willing to stipulate that it is one hundred ten per month?

Mr. Spohn: No, we are not in a position to even know what the listing was.

The Court: I am not going to require you to stipulate to a fact that you do not know to be true, but for the purposes of the record, at least, we can agree here that it was listed on the market and that it was listed with the Radford agency, and then the amount which it was listed for will have to be an amount of proof. I can't require counsel to accept a stipulation as to the amount, even though that may be accurate, and I don't want you to stipulate to it without checking it. [82]

Mr. Cornish: I don't care whether he accepts all or part of the stipulation. I merely wanted to

(Testimony of Beatrice Wilson.)

let the Court know that there won't be any contention on our part that it wasn't listed. We don't deny it.

Mr. Spohn: Then, it is stipulated that the premises were registered with the Radford Company, among others, for a rental at this time.

The Court: Yes.

Mr. Spohn: All right.

Q. Now, returning to your testimony, Mrs. Wilson, do you recall the circumstances under which you were referred to the defendants McKittrick for the rental of this house?

A. Yes, because——

Q. I think you have previously stated that you came upon this listing in canvassing the market? Is that right?

A. That's right.

Q. And through the Radford Agency, you learned that the house at 111 Oakmont Avenue, Piedmont, was for rent?

A. That's right, uh-huh.

Q. Were you referred to the defendants McKittrick, or was the matter handled by the Radford Agency—or, after you found out that it was listed, how did you go about renting it?

A. We handled it ourselves.

Q. How were you put in touch with the defendants?

A. I asked—I can't recall the real estate lady's name, but [83] I asked her the name of the people who were living in it, because at that time it was

(Testimony of Beatrice Wilson.)

getting late in the afternoon and she didn't want to show me the house. It was after five. But because I wanted a house I then went home and phoned the people—their name was Evans—looked in the phone book and got the name, told them I heard the house was for rent and could I see it. They said yes, and I phoned Mr. Wilson from San Francisco and he flew home. We both went over about six o'clock to see the house.

It suited our needs very nicely. We said yes, we would take it. We were told we couldn't until we were interviewed by the owners who lived in Walnut Creek.

We happened to know our way around Walnut Creek, so we phoned the McKittricks and asked if we could come out and see them that night, and they said other people were coming but we could come tomorrow, yes, which we did. We were the first ones that were there because we knew how to find the house. We were the first ones to be interviewed by the McKittricks.

Q. You and your husband?

A. Yes, both of us. They would not say whether we could have the house or not until the next day, and I think it was the next day that they phoned me and said, "Yes, you may have it."

Q. Now, the first evening that you and your husband called upon the McKittricks at Walnut Creek, did you have any discussion about the [84] rent?

(Testimony of Beatrice Wilson.)

A. Oh, I am sure we must have.

Q. Do you recall exactly whether or not you did have any discussion?

A. Yes, we had a discussion about the rent.

Q. And do you recall the details of that discussion? In other words, how much the rent was said to be, and anything that was said as to the fashion, manner, in which you should pay it?

A. Not the fashion that we would pay it, but we went home realizing that if we——

Q. Before you went home, do you recall what, if anything, was specified as the rent for the house?

A. We realized that we would have to pay \$135.00 for that house if we——

Mr. Cornish: I ask that that answer go out as not responsive.

Mr. Spohn: If your Honor please, we will straighten it out.

The Court: Counsel is entitled to have the record clarified, and that answer will go out, and the form that it is in, but you will be permitted to question her further on it.

Q. (By Mr. Spohn): To rephrase it, Mrs. Wilson, did the McKittricks tell you what the rent was for the house? A. Yes.

Q. And what, if anything, did they say?

A. They told us that they had been getting \$110.00 a month [85] but that they were going to go and ask for \$135.00.

Q. Where were they going to go and ask?

(Testimony of Beatrice Wilson.)

A. It was an O.P.A. that controlled that, the rent control agency.

Q. And did they tell you that the rent would be \$135.00 or——

A. That they thought it would be, yes.

Q. And did you agree to pay that? Now, that was the first night that you were there?

A. Yes.

Q. Now, you say that you went again another night. First of all, did you sign any lease or enter into an agreement on that first night?

A. No.

Q. Did you pay any money the first night?

A. No.

Q. When did you get down to the details of actually paying money?

A. Well, it was a day or two later.

Q. A day or two later?

A. Yes, they phoned us and told us that we might have it, and we settled it as quickly as possible. I would say maybe the next night or maybe the night after that.

Q. Now, where did you settle it?

A. In their home.

Q. You went back to Walnut Creek? [86]

A. Yes.

Q. You and your husband went? A. Yes.

Q. And who were there besides the McKittricks and their daughter?

A. We met their daughter for a short time.

Q. Nobody else there? A. No, no.

(Testimony of Beatrice Wilson.)

Q. Do you recall the transaction that occurred then on the second evening when you went back?

A. I couldn't tell you just word for word,

Q. Now, what I am getting at directly, do you recall whether you discussed entering into a written lease for the premises? A. Oh, yes.

Q. Do you recall if a written lease was signed that evening? A. I think it was.

Q. Is that the lease which has been identified as defendants' Exhibit C? (Showing the witness a document.)

A. I haven't seen this one.

Q. On the back of which appears the signature of Barbara McKittrick, Bruce Wilson, and Beatrice Wilson? A. That is my signature, yes.

Q. Do you recall signing that lease?

A. Yes, I believe I do.

Q. Do you recall any of the details about the change that [87] appears to have been made here on the first page as to the amount of payment which is initialed by your husband? Do you recall any discussion about that?

A. No, but there was some discussion about this change in rent from what the Evans had been paying and what we were to pay.

Q. What was that discussion?

A. Well, the discussion was there, you see, the rent ceiling—there was a week there that was sort of a moratorium on rent ceilings at that time. It was removed for about a week, and it was at that time and they said that they were going to go and

(Testimony of Beatrice Wilson.)

ask that their rent ceiling be raised because they felt their place, being rented as a furnished house, was worth more than the \$110.00 that they were getting and that there were so few places on the market that they should have it, and we thought that it would all be taken care of and so we went along with it.

Q. Now, do you recall any discussion about how this money should be paid? Particularly, Mrs. Wilson, I have reference to the testimony given by your husband this morning to the effect, to the effect that \$300.00 was paid in a lump sum at the time you entered into the lease arrangement, that the \$110.00 was paid each month in addition to that three hundred.

Mr. Cornish: I will object to that on the ground that it is leading and suggestive. [88]

Mr. Spohn: If your Honor please, I am just asking the witness what recollection she has of the transaction, which goes to the very nub of the proceeding.

The Court: That, I understand, counsel, but relating to what her husband has testified to, is, in form, leading. I don't know how suggestive it is. You are trying to direct her to a certain subject.

Mr. Spohn: Factually.

The Court: Well, I will overrule the objection at this time, but I will, since the objection has been raised, caution you to let the witness answer the questions and have the questions not indicate the answer.

(Testimony of Beatrice Wilson.)

Q. (By Mr. Spohn): Mrs. Wilson, do you recall the details of payment of the rent?

A. Yes.

Q. You do? A. Yes.

Q. Now, will you state briefly what those details were?

Mr. Cornish: I will object to that, if the Court please, as calling for the opinion and conclusion of the witness.

The Court: Overruled.

Mr. Cornish: I have no objection to her testifying to the conversation, but I think to testify to what the details of payments were is calling for her conclusion.

The Court: It is still overruled. We want the sum and [89] substance of the conversation.

Q. (By Mr. Spohn): To the best of your recollection, will you tell the Court what transpired?

A. After some discussion about the rent, it was decided, because they wanted a *least*, they wanted to know that we would say there for a year at least; and, you know, they didn't want tenants moving in and out of their house often, and it was decided that we would pay the rent at \$110.00 a month and pay the \$300.00 in a lump sum until we got this adjustment made, and it was our understanding it was only a routine matter and they would get the adjustment made. The fact that we didn't further hear from them also led us to believe that we were to continue to pay as we had paid,

(Testimony of Beatrice Wilson.)

so that when the year was up, we paid \$135.00 because, in essence, we had been paying \$135.00.

Mr. Cornish: I will ask you Honor that that answer be stricken out on the ground that it is the opinion and conclusion of the witness.

Mr. Spohn: If your Honor please——

The Court: On that ground, I will overrule the objection.

Mr. Cornish: As to what they inferred and what they concluded.

I have no objection to what was said, but the conclusion that they drew, I object to.

The Court: And it goes beyond a direct answer to the [90] question, Mr. Spohn. That portion of the answer that deals with subsequent to the meeting there will go out, but that portion of the conversation that dealt with the time at which the meeting took place will stand.

Q. (By Mr. Spohn): Well, now, directing your attention, Mrs. Wilson, to the time of July, 1947, do you recall the renewal of the lease?

A. No, it seems to me——

Q. To refresh your recollection——

A. Yes, I know that little item that is written there. Mr. Wilson wrote it. The year was up and we had some little discussion about it at home.

Q. At home? Now——

A. At our home.

Q. You and Mr. Wilson?

A. Mr. Wilson and I. We did not go out to see the McKittricks.

(Testimony of Beatrice Wilson.)

Q. You did not? A. No, sir.

Q. What did you do?

A. As I recall it, we just signed. He wrote that little notation to the end of our lease and sent it to them and they sent it back to us.

Q. Do you recall any discussion that you had with them?

A. No, we didn't have any discussion. [91]

Q. You didn't have any discussion?

A. No, we didn't have any discussion about it.

Q. Now, subsequently, I believe that renewal ran according to the lease, ran for the year July 13, 1947, to July 13, 1948. Do you recall any discussions on or about July 13, 1948, about any further renewal of the lease?

A. All this time, we were waiting to have a home of our own; and by that time, we had hoped that we would find one and we had hoped that we would not have to sign another lease because, some time during that year, we hoped to find a place that we could have, so they didn't ask us to sign it, and we decided that we wouldn't volunteer to it as we had the first time.

Q. Did you have any discussion with the McKittricks when the renewal expired in July of 1948?

A. No.

Q. Was there any discussion thereafter with them? A. No.

Mr. Spohn: I have no further questions of Mrs. Wilson at this time.

(Testimony of Beatrice Wilson.)

Cross-Examination

By Mr. Cornish:

Q. Mrs. Wilson, all that you found out from the Radford Realty Company was that the house at 111 Oakmont was available for rent?

A. That's right.

Q. They never showed you the house? [92]

A. No.

Q. They didn't even tell you who owned it?

A. No, I don't think so.

Q. And you discovered the telephone number of the tenant, the name of the owner, by your own resources?

A. That's right.

Mr. Cornish: I have no further questions.

The Court: That is all.

(Witness excused.)

Mr. Spohn: If your Honor please, that constitutes the plaintiff's case in chief.

(Plaintiff rests.)

Mr. Cornish: We will call Mr. McKittrick.

The Court: All right.

DONALD McKITTRICK

one of the defendants, called in his own behalf, having been duly sworn, testified as follows:

Direct Examination

By Mr. Cornish:

Q. Mr. McKittrick, you and your wife own this property at 111 Oakmont Avenue? A. Yes.

Q. And where do you live?

A. Walnut Creek.

Q. What is the address in Walnut Creek?

A. Post Office Box 39. The house is on San Miguel Road. [93]

Q. What kind of a house do you live in, in Walnut Creek?

A. It's a wooden frame building. As to the number of rooms available——

Mr. Spohn: If your Honor please, the issue doesn't concern the living quarters of the defendant in Walnut Creek. It only concerns whether they overcharged for the premises on Oakmont.

The Court: Is this preliminary to anything?

Mr. Cornish: Yes, your Honor, to our defense that there is no equity in the case that justifies restitution. This house that he is about to describe is the property which we are prepared to show that at the time the Wilsons applied for this property, they had an opportunity to lease for \$180.00 per month.

The Court: I think I understand, and they have raised the issue in their pleadings, counsel—in their

(Testimony of Donald McKittrick.)

answer, saying—or in the interrogatories, as I recollect it, in the answers to the interrogatories—taking the position that there was an agreement for some sort of a premium for giving up the opportunity to rent their home in Walnut Creek to some other person.

Mr. Cornish: That's right.

Mr. Spohn: If your Honor please, on the law and on the regulations, that is beyond the issues. Under the regulations, any bonus, gratuity, or other payment which is made for or in consideration with the rental of any controlled housing [94] accommodations constitutes an overcharge.

Mr. Cornish: And it is recoverable within a year, but not after. You are coming into equity.

Mr. Spohn: Under Section 205 which relates to the action brought by the defendant in his own right, but not under Section 206 which relates to the injunction and other reliefs sought by the government in this proceeding.

Mr. Cornish: May I call your Honor's attention to the fact that, during a substantial portion of this period, the government had no cause of action. Now, there was only the tenant that could bring the suit.

The Court: We are going to get into that in argument, and the thing I am interested in now is the point of your objection, which I understand is that it is incompetent, irrelevant and immaterial.

Mr. Spohn: That is quite right, yes, your Honor, under the law and under the regulations.

(Testimony of Donald McKittrick.)

The Court: Under the law and the regulations; however, I am not at this time prepared to make a ruling on this point and I don't want to hear the argument now, and make an arbitrary ruling, cutting counsel off. I am going to allow him to proceed. I am going to overrule the objection, but permit you to make your motion to strike and reserve my ruling on the motion to strike, and then we will hear the argument, either orally, or in writing. [95]

Mr. Spohn: Well, I will make the motion formally, then.

The Court: Yes.

Mr. Spohn: To strike this entire line of testimony on the ground—

The Court: First, I think you should object.

Mr. Spohn: I object to this on the ground that it is incompetent, irrelevant and immaterial to the issues here at hand, and I base that objection on the provisions of the statute, the Emergency Price Control Act of 1942 as amended, particularly Section 4a thereof and the Regulations adopted pursuant thereto, which are to be found in the Rent Regulations for Housing under that Act, published at 9 Federal Register, 5807, Section 2 and Section 13, appearing on May 30, 1944; and also under the comparable statutory provision, Section 2068 of the Housing and Rent Act of 1947 as amended, and the Regulations issued pursuant thereto and published in 12 Federal Register at 4331 on July 3,

(Testimony of Donald McKittrick.)

1947, particularly Sections 1 and 2 of the later regulation.

The Court: Well, now, I will overrule that objection now, but the testimony—it will be understood that the testimony that will follow along this line will be subject to your motion to strike upon the same grounds, and the Court is now stating at this time that it is going to reserve its ruling upon that motion.

Mr. Spohn: In effect, you are holding it in abeyance? [96]

The Court: That's right. I am going to hear the testimony subject to that motion to strike.

Proceed.

Q. (By Mr. Cornish): Just describe this home, if you will, please, this home in Walnut Creek.

A. Four buildings, one a garage with living quarters, and a bathroom, and the housing accommodations for a man, a garage for two cars, and a bathroom, a storeroom of about 30 by 20, concrete floor. Another building with 2 rooms, bedroom below, a library above. The other building contains—well, the total makes 9, and 2 bathrooms.

Q. Nine rooms and 2 bathrooms?

A. There are three bathrooms altogether and 9 rooms altogether.

Q. And what area of land is involved with that house? A. Between six and seven acres.

Q. Now, do you recall when you first met the Wilsons? A. Yes.

Q. At or about that time, had you had any in-

(Testimony of Donald McKittrick.)

quiry made as to the availability of your Walnut Creek home for rent? A. Yes.

Q. Were those inquiries made before or after you met the Wilsons?

A. They were made before we met the Wilsons. They were made after the house—we knew the house was going to become vacant. [97]

Q. After you knew the Oakmont house would become vacant? A. Yes.

Q. And do you recall the name of any person or persons who made inquiry about the house?

A. Yes, there was a man whose name was Mr. Grierson or Grayson—some such name—who had done—or had come out in connection with some work on the house about a year before, I think, and he came out to see us and wanted to know if we wouldn't let him have the house.

Q. What did he offer you?

A. One hundred eighty per month.

Q. Was that house subject to Area Rent Control regulations? A. No.

Q. Now, how long was that inquiry prior to the time you met the Wilsons?

A. Oh, a few days.

Q. A matter of a few days? A. Yes.

Q. Had you and your wife discussed it—this proposition? A. Yes.

Q. And had you and your wife come to any conclusion as to whether or not you would accept the proposition before you met the Wilsons?

A. No, but we were considering it because there

(Testimony of Donald McKittrick.)

was—you see, there was \$79.00 a month difference in rental between [98] that and what you could get for the one in Oakland.

Q. Now, where were you working at the time?

A. What was that date?

Q. In 1946, the summer of 1946.

A. I think I was still at the University then.

Q. The University of California? A. Yes.

Q. And was this house in Oakmont closer or farther away from the University of California?

A. Oh, much closer.

Q. In other words, there would have been—you could have saved transportation, as well as you might save rental overhead by moving into Piedmont? A. Oh, yes.

Q. Now, when did you first meet——

Mr. Cornish: That, your Honor, is the extent of the testimony that I propose to offer covering which counsel has made his motion to strike.

I will stipulate that the motion has been renewed to—the objection made and you have reserved the ruling.

Mr. Spohn: I remove the motion to strike on the grounds that I have given——

The Court: Yes, he has stipulated to that fact, and that will be the state of the record.

Q. (By Mr. Cornish): Now, Mr. McKittrick, where did you first [99] meet the Wilsons?

A. When they walked in at the door the evening to inquire about the house.

(Testimony of Donald McKittrick.)

Q. Had you talked to them on the telephone before, yourself?

A. My wife, I believe, had.

Q. And the first you heard from them was when they first came to the door?

A. That's right.

Q. They came together?

A. Yes.

Q. And you and the Wilsons had a conversation at that time at your home?

A. That's right.

Q. Who was present?

A. Myself and my wife, Mr. and Mrs. Wilson.

Q. Will you tell us, Mr. McKittrick, as best you can now recall what was said by each of you in that conversation?

A. I can give you the substance of the conversation, that is to say, the tenor of it. We pointed out to them that we had this rent offer of \$180.00, or we had a recent offer. I don't know if I specified the sum. We didn't feel that we should rent it at one hundred ten. We didn't feel we should rent it until we had thought about it, but Mr. Wilson said that he thought the place was worth more than one hundred ten. The conversation fixing that figure of one hundred thirty-five, I [100] do not remember, but we did not settle with him that night; and his last remark on leaving the house was—he said, with a sort of a friendly boyish air, you know, "Please, Mr. McKittrick, rent us your house." So that is as far as it went that night.

Q. Now, up to that time, had your wife, to your knowledge, made inquiry with the Area Rent Con-

(Testimony of Donald McKittrick.)

trol Office as to the possibility of increasing your rent ceiling on the property at Oakmont?

A. Not at that time, no.

Q. All right. Up to the time that you finally—you and Mr. Wilson and your wife signed the lease, had you or your wife made inquiry from the Area Rent Control as to the possibilities of increasing the rent?

A. No.

Q. Were there any negotiations pending, to your knowledge, at the time that you leased the property to the Wilsons, pertaining to an increase in rent?

A. No.

Q. All right. Now, what was your next contact with the Wilsons following the first night when they came to the house?

A. They came, as Mr. Wilson said, one or two days later; and at that time the agreement was settled.

Q. All right; did they come at their invitation, or at yours?

A. We told them they could have the [101] house.

Q. You told them that how, by telephone?

A. Yes, because there were the only two times—that is, I presume it was by telephone; there was no other method that I can think of.

Q. In other words, between the first meeting at your home and the second meeting at your home, either you or your wife telephoned the Wilsons and told them could have the house?

(Testimony of Donald McKittrick.)

A. That's right. I think that is what was said. I have no recollection myself of how it came.

Q. All right.

A. They may have come voluntarily the next time; I don't remember.

Q. Now, I call your attention now, Mr. McKittrick, to defendants' Exhibit C for identification, and ask you in whose handwriting that is?

A. That is my handwriting.

Q. That is? A. This dark stuff.

Q. That is, except the printed portion, your handwriting?

A. You mean the longhand? This is all in mine, yes.

Q. Now, calling your attention to the date, the 13th of July—— A. Yes.

Q. (Continuing): ——1946, is that your handwriting? A. That's right; that is mine.

Q. Now, I call your attention to the figure on the third line, [102] the 13. A. Yes.

Q. And the fact that that has been altered. Can you tell me about that alteration?

A. This, I take it, looks as though—it came about this way, I think. Mr. Wilson asked if he could send his check on the 15th rather than the 13th because he wrote his checks for all his monthly payments on that day and it would be very convenient. I said yes, of course, he could; and I imagine I started to change the lease from the 13th to the 15th, and then decided to let it go to the 13th and simply say in the body, as we do here, that the rent would be due on the 15th.

(Testimony of Donald McKittrick.)

Q. All right. Now, I call your attention to the change on the third from the bottom line on page 1 where the word, "sixteen" is crossed out and the word, "thirteen" interlined. A. Yes.

Q. Simply to the figure "16, 20" crossed out, and the figures "13, 20" interlined. A. Yes.

Q. That was done by you, was it? Was it done in Mr. Wilson's presence? A. Yes.

Q. Now, did you and Mr. Wilson discuss the change of those figures before you changed them?

A. I don't remember the discussion but they were changed in [103] his presence.

Q. Those are his initials alongside of those changes?

A. That's right. I pointed out to him the necessity of initialling the changes with both our initials wherever they occurred.

Q. Now, was that made out in his presence, or had you made the lease out by the time he arrived?

A. No, we wrote—I couldn't say as to that, but I know I made a copy in his presence, the clean copy that he had.

Q. I am showing you now plaintiff's Exhibit 3 and I will ask you if you copied that in Mr. Wilson's presence?

A. Yes, I did. I remember clearly that I was in a hurry to get that over with, not to delay him.

Q. And after that was copied, did Mr. Wilson leave the house with that copy? A. Yes.

Q. It wasn't mailed to him two or three days later? A. No.

(Testimony of Donald McKittrick.)

Q. Then, at that time that the second copy was made, the changes had been made and initialled in the first copy, is that right?

A. At the time the second—yes, the second copy was made from the first copy.

Q. Now, you received Mr. Wilson's check for \$300.00, did you not? [104]

A. From his hand?

Q. Yes, and that was handed to you at the same time the lease was signed?

A. That's right.

Q. I call your attention to the discrepancy in the dates of the check dated the 11th of July, and the lease being dated the 13th, and ask you if you can explain that discrepancy?

A. No, I didn't look at the dates.

Q. Was the lease dated the day that it was signed?

A. Yes; that's how the discussion about 13 and 15 arose.

Q. Then, the check, the dates on the check, then, would be an erroneous date, and not the date on the lease?

A. Well, it is not the date on the lease.

Q. At the time you were talking about this lease, did you and your wife and Mr. Wilson and Mrs. Wilson discuss the Area Rent Control ceiling price on the rent?

A. Yes, we told them it was one hundred ten, and that at that price, we didn't feel justified in—

(Testimony of Donald McKittrick.)

well, that was the day before—we had already told them that the day before.

Q. And Mr. Wilson told you that, in his opinion, it was worth \$135.00? A. That's right.

Q. Now, were there any conversations that you can recall now between yourself and Mr. Wilson concerning him paying you \$300.00 in [105] advance?

A. He offered to make the payment. I am trying to think why I had that one hundred thirty-five on the lease and then crossed it out. I don't remember that.

Q. Did you ask Mr. Wilson to give you the check for \$300.00, or did he offer to give it to you?

A. The offer came from him to make the extra payment.

Q. And up to the time that he offered, you hadn't asked him to pay more than \$135.00 per month as was written in the lease?

A. More than one hundred thirty-five?

Q. At one time—let me reframe the question.

A. I didn't ask him.

Q. You hadn't asked him for a check for more than \$135.00 up to the time that he made it, or to give you a check for the three hundred?

A. We hadn't asked him for a check for more than one hundred ten before he made it over.

Q. For more than one hundred ten. Now, during the rest of the year of the lease, Mr. Wilson sent you checks regularly for \$110.00?

A. Yes.

(Testimony of Donald McKittrick.)

Q. Now, I am calling your attention to the extension agreement on the part of the plaintiff's Exhibit 3, and I will ask you when you signed that extension agreement?

A. On his copy, or mine?

Q. On his copy. [106]

A. That I don't remember; but it was—well, I remember that it was at least two or three months after the date July 13.

Q. Of 1947? A. That's right.

Q. And where was it signed?

A. On his copy?

Q. On his copy.

A. I don't doubt his statement is correct that he made to me, because I can tell you what occurred on that evening at his house, if you wish.

Q. Now, I call your attention to defendants' Exhibit C for identification, and the extension on that, and ask you when you signed the extension agreement on defendants' Exhibit C for identification?

A. That was also at a time two or three months after July 13.

Q. All right, were the extension agreements on those two copies signed at the same time?

A. I don't call to mind the signing of more than one of them at the same time. That is this one which is written in my handwriting.

Q. Now, where was the one that was written in your handwriting on defendants' C for identification signed?

(Testimony of Donald McKittrick.)

A. In Mr. Wilson's home. That is to say, 111 Oakmont.

Q. And both Mr. and Mrs. Wilson affixed their signatures at the same time? [107]

A. That's right.

Q. Was your wife present at the same time?

A. Yes, and——

Q. And she signed at the home? A. Yes.

Mr. Cornish: We ask that C for identification be admitted into evidence.

The Court: It will be admitted into evidence as Defendants' Exhibit C.

(Thereupon Defendants' Exhibit C, defendants' copy of lease, was admitted into evidence and marked Defendants' Exhibit C.)

DEFENDANTS' EXHIBIT C

[A lease of premises similar to Exhibit A attached to Answers to Interrogatories filed Oct. 28, 1950. See pages 27 to 30 of this printed record. The following renewal is an addition to the original lease in Defendants' Exhibit C.]

This lease is hereby renewed for the present from July 13, 1947, to July, 1948, on the same terms as above.

/s/ D. S. McKITTRICK,

/s/ BARBARA McKITTRICK,

/s/ BRUCE A. WILSON,

/s/ BEATRICE S. WILSON.

(Testimony of Donald McKittrick.)

Q. (By Mr. Cornish): Now, at the time you signed the extension on either one of these leases, previous to signing the extension, had you received any check from Mr. Wilson other than the \$300.00 check, for more than \$110.00?

A. Yes, we had received two or three monthly checks for one hundred thirty-five.

Q. Had you ever asked Mr. Wilson to make out a check for one hundred thirty-five dollars?

A. No.

Q. He had sent those of his own volition?

A. That is right.

Q. And two or three of those checks had been sent before the extension agreement on either copy was endorsed? [108]

A. That's right.

Q. Now, at the time you went to Mr. Wilson's home, or to 111 Oakmont, and you and your wife talked to Mr. and Mrs. Wilson concerning the extension——

A. Yes.

Q. (Continuing): ——will you relate the conversation that you had at the time that you signed the extension agreement at Mr. Wilson's home?

A. We went there in the evening—yes, it was by appointment over the telephone, and after a little general conversation, 15 or 20 minutes or a half an hour, Mrs. Wilson said, "Would you have a drink?" And we said, "Yes," and she brought whiskey and soda and we had them. And I said to Mr. Wilson, "What about the lease? It ought to be signed again; it's two or three months." He said, "Well, since the old one expires," he says,

(Testimony of Donald McKittrick.)

“Well, I am satisfied with the way things are going now, if you are; let’s have it.” And I passed it to him and he signed it. Then, the other signatures were affixed. There was a little more conversation and we went home.

Q. Did you ask Mr. Wilson to pay another \$300.00 at that time? A. No.

Q. Now, then, each monthly check that Mr. Wilson sent you from that time on was \$135.00?

A. Yes. [109]

Q. Did you at any time after Mr. Wilson moved into the house, ever ask him to send you a check for \$135.00? A. Never.

Q. You did, however, receive such checks?

A. Yes.

Q. Now, what condition did you find the premises when Mr. Wilson left?

Q. Quite a lot of work done on it, both in the garden, the shrubbery trimmed back, and the furniture in the attic was badly moth-eaten and the rugs were moth-eaten. Several items—two items that were mentioned by you were missing from the inventory.

Q. You mentioned two items missing. Can you describe those two items?

A. Yes, a water color landscape and a drypoint etching by a man who is a well known painter.

Q. And what was the value of the water color landscape?

A. I am not an expert, but compared with

(Testimony of Donald McKittrick.)

others, it was quite an attractive picture. I would say around a couple hundred dollars.

Mr. Spohn: We will object to that as calling for the conclusion of the witness. He testified that he don't know what it is worth.

The Court: He said he is not an expert.

Mr. Cornish: The owner can always testify as to the value [110] of his own property. The objection goes to the weight of the evidence.

The Court: That is true. The objection is overruled.

Q. (By Mr. Cornish): Was the picture framed when Mr. Wilson moved in?

A. Yes, hanging in the living room.

Q. And did you find the frame after he moved out?

A. Yes, we saw it quite recently up in the attic.

Q. In other words, the frame is still there, but the picture is gone?

A. That's right.

Q. Now, the etching: What in your opinion was the value of the etching?

A. It was a signed etching by a painter, Piazzoni, and I would estimate it at \$200.00—a dry-point.

Q. Now, was there any damage to the furniture that was still in the lower part of the house—not in the attic?

A. I think you had better ask my wife those questions because she went over the furniture carefully. I only looked at it more or less casually.

(Testimony of Donald McKittrick.)

Q. Do you know whether any money was paid out for repairs on any such furniture?

A. By ourselves?

Q. Yes.

A. Yes, we had a lot of work done. We had a man there for a [111] couple of weeks cleaning and polishing and pruning and so on.

Q. Now, what was the condition of the things in the attic?

A. They were badly moth-eaten. The davenport, its cushions, and I have in mind at least one upholstered chair.

Q. Now, were the upholstered chair and the davenport and the cushions in the attic at the time that Mr. Wilson moved in?

A. That's right. He asked permission to leave them there because the Evans had had them up there, and we granted him that permission.

Q. And were those items included on the inventory? A. They were.

Q. Was the furniture in the house turned over to you completely cleaned? Were the windows cleaned, blinds cleaned, floors cleaned, waxed and polished, and all trash removed and the entire property ready for occupancy when the Wilsons moved out?

A. No. As I said, we had to spend a couple of weeks' work on it.

Q. Was the garden turned over in good condition? A. No.

Q. Did Mr. Wilson do the cultivating, fertiliz-

(Testimony of Donald McKittrick.)

ing and irrigating necessary to maintain the garden during the time he was there?

A. As to that, of course I am not in a position to say. I know what the garden was like when he went there and what it [112] was like when he left.

Q. What was the difference?

A. He had kept the garden in very nice shape. He had a man there pruning and cutting grass and all. The shrubbery had grown up quite a lot during the time the Wilsons were there, the three years.

Q. Had he kept them pruned?

A. Not sufficiently, no, because we had to have them pruned. It took several days, as I say, to get them in shape after they had left.

Mr. Cornish: You may cross-examine.

The Court: Now, counsel, before you proceed to cross examine, we will take a short recess at this time.

(A short recess was taken.)

After Recess

The Court: Proceed with your cross-examination, Mr. Spohn.

Cross-Examination

By Mr. Spohn:

Q. Mr. McKittrick, I believe you testified that the premises in Oakmont Street were listed with several real estate agents for rental in July of 1946.

A. They were.

(Testimony of Donald McKittrick.)

Q. Do you recall the amount of rent specified in those listings? A. One hundred ten.

Q. One hundred ten. You have previously testified about the [113] negotiations that you and your wife had with Mr. and Mrs. Wilson for the rental of the premises, in July of 1946.

A. What were you asking?

Q. I say—— A. You heard what I said?

Q. All right. You recall what you said?

A. Here, a moment ago, yes.

Q. Now, who specified the amount of rent of \$135.00 for the premises?

A. Mr. Wilson. By that question, I presume that you mean the offer to rent, to pay more than one hundred ten came from Mr. Wilson, is that what you mean?

Q. My question was—and I repeat—who first specified the amount of \$135.00 as the rent for the premises? A. Mr. Wilson.

Q. Are you quite certain of that?

A. I am certain that I did not set any figure over one hundred ten, because I am certain that I said we couldn't afford to rent it at that, we would have to move out—back, rather.

Q. Now, do you recall the conversation that took place among the four of you on that occasion?

A. Parts of it.

Q. Well, do you recall whether or not the Wilsons asked what the rent was?

A. The rent was discussed, since they knew what the rent was. [114]

(Testimony of Donald McKittrick.)

Q. Now, I am asking you——

A. They did not—do I recall them specifically saying to me, “What is the rent for the house?”

Q. Yes. A. No.

Q. Do you recall your saying what the rent of the house was? A. Yes.

Q. You told them how much?

A. One hundred ten.

Q. Did you tell them that was the so-called O.P.A. ceiling amount?

A. That’s right. That was the point of the discussion, of course.

Q. And what did you say about that one hundred ten rent?

A. That we thought we would move back into Oakmont Avenue because we could get more for our place out there.

Q. By “the place out there,” I assume——

A. Walnut Creek, yes.

Q. Now, what was the next statement made after you said that?

A. I, of course, cannot recall the conversation of four years in a sequence of statement, but I can give you the tenor of the conversation, if that is satisfactory.

Q. I am asking you to the best of your recollection what was the next statement?

A. I have no idea what the next statement that was made after [115] the preceding one was.

Q. Have you any idea, Mr. McKittrick, of who

(Testimony of Donald McKittrick.)

first proposed paying \$135.00 a month rent for the premises?

Mr. Cornish: I object to that as having been asked and answered.

The Court: I will overrule the objection. You can answer it if you can.

The Witness: I say it was Mr. Wilson.

Q. (By Mr. Spohn): Do you recall any detail as to how that amount should be paid?

A. I cannot recall the details that involved my writing that lease at one hundred thirty-five, rubbing out the figures and making them one hundred ten, and Mr. Wilson paying that \$300.00 in one lump sum.

Q. You have no recollection whatsoever of that?

A. Of the details of that, no. I have a recollection only that the figures were crossed out, and I pointed out to Mr. Wilson that, because of the change, we should both initial them.

Q. Do you recall how the \$300.00 happened to be paid in one lump sum?

A. Rather the increments.

Q. Rather than monthly, how did it happen to be paid in one lump sum in advance?

A. Yes, we couldn't very well move back after Mr. Wilson was in, and Mr. Wilson might easily have said he didn't wish to [116] continue paying the bonus for not moving back in, so it was safer to get it first.

Q. Well, did you specify that it should be paid in advance?

(Testimony of Donald McKittrick.)

A. I told him if he wanted to pay that bonus, he had better give it to us.

Q. At that time? A. At that time.

Q. At that time in advance?

A. At that time.

Q. Now, you thereupon entered into lease agreement that is in evidence? A. That's right.

Q. Now, you have testified as to the renewal of the lease—— A. That's right.

Q. (Continuing): ——sometime a year later. Do you recall any conversations as to the way in which the rents should be paid for the second and following years?

A. Yes, as I said, I said to Mr. Wilson, "What about this lease?"—taking it out of my pocket, and he said, "If you are satisfied with the way things are going, everything is perfectly satisfactory with me."

Q. All right. And then you apparently—what did you say to that?

A. He reached out for the lease and took it across and signed it at a table across the [117] room.

Q. Who wrote the extension provision in it?

A. That's in my handwriting in one copy; not in mine on the other.

Q. And to the best of your recollection, when did that occur?

A. Two or three months after the date July 13.

Q. Now, I believe you testified, did you not, Mr.

(Testimony of Donald McKittrick.)

McKittrick, that at that time you were receiving monthly checks in the amount of \$135.00?

A. That's right.

Q. From the Wilsons. Did you have any conversation with them as to departure from the previous arrangement?

A. Except what I told you, I had no conversation with them at any time about the rent.

Q. You did receive and cashed the \$135.00 checks as they came in? A. That's right.

Q. And you continued throughout the period of their occupation to do that?

A. I cashed every rent check they sent me.

The Court: That has been stipulated to, counsel.

Mr. Spohn: Yes.

Q. Now, directing your attention to the—I might ask one further question—have you made any refund of any amounts to the Wilsons?

A. None. [118]

Q. Have you been served with papers as a defendant in any personal suit brought by them to recover any amounts in this transaction?

A. Not that I know of. Somebody came out with papers at some time and I referred them to my attorney, but I imagine it was the government's action.

Q. Addressing your attention to the matter of the furniture in the premises, what furniture was in the living quarters of the house at the time the Wilsons moved in, in July of 1946?

(Testimony of Donald McKittrick.)

A. Downstairs?

Q. By "the living quarters," I mean in the rooms which were used for living purposes, distinguished from the basement and the attic.

A. You include bedrooms?

Q. Yes, those rooms which were used for living purposes.

A. The normal furniture in a house, tables, chairs, beds, rugs, pictures. Well, now, as to that, I mean, you exclude those that were taken upstairs?

Q. I am asking you.

A. Ask it again, will you please?

Q. What furniture was in the living quarters of the house at the time the Wilsons occupied it?

A. I can only answer your question indirectly, because I have no mental picture of the house at that time. I can tell you the circumstances. Captain Evans had asked our permission to [119] move certain—after he had been there a certain length of time, he had got some furniture out from the East, because he expected to be stationed here for a long time.

Q. Without going into that detail, did you inspect the furniture prior to the time the Wilsons rented it? A. Yes.

Q. After the Evans moved out?

A. No, while they were still there.

Q. Towards the end of their tenancy?

A. Towards the end of their tenancy.

Q. Do you recall how much of your furniture was then in the living quarters of the house?

(Testimony of Donald McKittrick.)

A. I would say—this is again a deduction of the mental picture of the house—that about half the furniture was theirs, and about half was ours.

Q. Between the time after the Evans, the prior tenants, moved out and the Wilsons moved in, how much time elapsed?

A. It must have been very short—I can't remember. I know we lost no rental, I think, in the transfer. It was a very short time.

Q. And you have just stated that you did not go into the premises during that interim?

A. Yes, we went in there. Yes, I remember now. I remember the condition of several articles.

Q. Now, just what articles were in the living quarters of [120] the house at that time?

A. Again, I cannot amplify the preceding answer.

Q. And what was the preceding answer?

The Court: He said about half——

Q. (By Mr. Spohn): About half?

The Court (Continuing): ——was theirs and half was the tenants'. Is that correct?

The Witness: Yes.

Q. (By Mr. Spohn): As a matter of fact, Mr. McKittrick, hadn't everything been put either in the basement or the attic with the exception of the rug in the front room? A. No.

Q. And let me finish my question—the rug and the davenport in the front room, a wicker table somewhere else—perhaps in the breakfast room—and the stove and refrigerator?

(Testimony of Donald McKittrick.)

A. No, the davenport was one of the things that was removed.

Q. By whom?

A. By the Evans, and that is one of the things that Mr. and Mrs. Wilson asked permission not to bring down from the attic in order—because they said that they had their own davenport and would not like to have the trouble of carrying it up and down again.

Q. Where was the davenport?

A. In the attic.

Q. You are quite sure about that? [121]

A. That, I am sure of.

Q. Would it surprise you to learn that it was in the basement?

A. I mean, it was out of the living room, to the best of my knowledge.

Q. Now, you have testified that at the time the Wilsons vacated the premises in November of 1949, you found that considerable damage had been done to the furniture. Now, what furniture in particular had been damaged?

A. As I said to Mr. Cornish, I remember those things that my wife pointed out to me. I didn't look at it in as much detail as she did. There was a davenport that was moth-eaten.

Q. Where was the davenport when you saw it after the Wilsons moved out?

A. When she called my attention to it, it was downstairs.

Q. Downstairs where?

(Testimony of Donald McKittrick.)

A. In the living room.

Q. In the living room. What damage had occurred to it? A. Moths.

Q. Moths. To what extent?

A. Well, there were large patches on it where the mohair was eaten down.

Q. Just where on the davenport were these large patches eaten off?

A. Towards the bottom. I don't think there was any on the top, that is, the back, the front. Those points are not, as I [122] say, clear in my mind. I didn't concern myself with those details of the house.

Q. Now, what other items of furniture were damaged when you first returned? A. A rug.

Q. Which rug?

A. Which rug? Wait a minute, let me think. There was a rug in the dining room that had moths in it.

Q. Now, was that on the floor of the dining room when you came back in 1949?

A. When we came back after Mr. Wilson had left?

Q. Yes.

A. I couldn't tell you where it was when Mr. Wilson left. I can tell you this, that I saw it on the floor with the moths in it and the moths were not in it when Mr. Evans left the premises, or at least a very short time before he left the premises because I saw it.

Q. But you don't know where the rug was?

(Testimony of Donald McKittrick.)

A. No.

Q. In November of '49, after the Wilsons moved out?

A. In the interval before, between the time the Wilsons left and I saw it on the floor, you mean?

Q. Yes.

A. In other words, was it in the attic when he left, or on the floor? [123]

Q. Yes. A. That, I could not tell you.

Q. Where was it when you saw it?

A. On the floor.

Q. How long after they moved out was that?

A. Between the time they moved out and the time the next tenant went in.

Q. How long was that?

A. A few days, between the time I saw it and they moved out. The next tenant did not, however, go in immediately.

Q. What other items of furniture were damaged?

A. As I told you, I have not a complete list in my mind. My wife reported to me a number of articles and things that I——

Q. Is it fair to say, in the light of your testimony here, that the only two items that you know of that were damaged were the sofa and rug in the dining room?

A. Three items. The overstuffed easy chair, and the davenport, and some cushions.

Q. Where was the overstuffed chair?

A. Where was it when?

(Testimony of Donald McKittrick.)

Q. When the Wilsons moved in.

A. That was also in the attic. I say "in the attic"—it was out of the living quarters, stored, up or down.

Q. Where was it when?

A. When I saw it. [124]

Q. When the Wilsons moved out and you saw it?

A. When I saw it, it was downstairs again.

Q. It had been taken out of the attic and put downstairs? A. Presumably.

Q. Do you know who took it out of the attic?

A. No.

Q. To what extent were these items damaged?

A. As I said, they were moth-eaten to such an extent that if you tried to sell them, they would have no value.

Q. Did you have them repaired?

A. You will have to ask my wife about those details of furniture.

Q. Did you have them——

A. Did I personally? Did I supervise, did I give an order for repair?

Q. Did you send them to be repaired?

A. I did nothing about it.

Q. Do you know where they were repaired?

A. My wife can tell you that.

Q. Is it your testimony that to your best knowledge you don't know whether they were repaired or not? Do you remember paying any bills for them?

A. It is my testimony that I do not know what

(Testimony of Donald McKittrick.)

specific articles in the furniture were repaired, or what was done to any given article. I can tell you only this: That work was done on the [125] furniture.

Q. Do you know by whom the work was done?

A. Yes, we hired a man to go out there and work on it. We had a man working there.

Q. What was his name?

A. His name was John Placido, I think.

Q. Where does he live?

A. I don't know where he is now. He was working for us at the time we had him out there for more than two weeks, doing repairs.

Q. What sort of work was he doing?

A. What does he do?

Q. Is he a furniture man or a house man or a gardener or just what?

A. He is a man capable of—he was a man capable of doing such a job as build a house. Yes, he is a carpenter.

Q. What sort of work did he do for you?

A. Oh, me?

Q. Yes.

A. Whatever I wanted him to do. I looked after the premises in Walnut Creek.

Q. Was he a general houseman?

A. What do you mean by general houseman?

Q. I wonder just how you would describe him. Was he an artisan?

A. Let's call him a handyman, if you like. [126]

(Testimony of Donald McKittrick.)

Q. All right, a handyman. And you had him repair these things?

A. He spent about two weeks working there.

Q. Repairing the furniture?

A. Yes, and other things, pruning the garden.

Q. How much did you pay him for that?

A. And putting the house in shape. That came to about two hundred, I think, for that.

Q. How did you pay him?

A. I beg your pardon?

Q. How did you pay him, by check?

A. Cash.

Q. Have you got any receipts for the money?

A. No.

Q. Do you have any record—income tax records that show that you paid that amount?

A. I have an income tax record. I don't remember what it shows. It shows the expenditures.

Q. Did you make any record at the time of what you paid this workman for the repair work that he did on the premises?

A. Let's see. We paid him for what he did. I can't tell you. At least two weeks he was there.

Q. In answer to my question that—

A. I beg your pardon?

Q. Do you have any record of what you paid him?

A. You mean, a separate record while he was working for me? [127] I can only estimate what I paid him, what his board and lodging was worth and the number of hours he put in that—

(Testimony of Donald McKittrick.)

Q. Do you have any record to show what you paid him during the period, say, of November, 1949?

A. Yes, he received——

Q. Where is that record?

A. At home. Wait a minute, that would be in the form of cancelled checks, plus his board and lodging.

Q. I thought you paid him in cash.

A. That is cash.

Q. Cash or checks?

A. Cash or checks. He got about—what did I say he got? About two hundred, didn't I?

Q. You, sir, should be in a position to recall that better than I. What was it?

A. Yes, he got about a value, I think—he got his board and lodging and he got his pay, his regular pay, and he worked hard there. He worked overtime and that. I paid him about \$50.00 extra in cash, plus his pay, which was \$50.00 a month, and his board.

Q. So that——

A. And my wife worked there during the same time.

Q. So that actually he received about \$100.00 for that month, is that right?

A. Plus his board and lodging, yes, for that period, let us [128] say, I don't remember whether it was—about two weeks, I think.

Q. During that time he was working for you at Walnut Creek?

(Testimony of Donald McKittrick.)

A. Employed by me, not working at Walnut Creek.

Q. Do you have any record anywhere that would substantiate your statements?

A. As to the period of time?

Q. And the amount of money that you paid him.

A. I have my cancelled checks for the cash he regularly received. I have no record of the extra money. I have no record, of course, of the cost of his board and lodging. I have no exact record of the time, the number of days of his time. I can, I think, however, give you that by looking at my income tax record.

Q. Did you take any deduction for the maintenance work that you had done on this rental property?

A. Of course.

Q. Do you recall what that was?

A. No, but I have it on my income tax.

Q. Where are those records?

A. At home.

Q. Now, directing your attention to the drypoint etching that you said was missing when the Wilsons left——

A. Uh-huh.

Q. (Continuing): ——how large an etching was that?

A. (Indicating.) I should say about eight by ten, a small [129] etching.

Q. And what was the subject matter of the etching?

A. Landscape.

Q. A landscape. Was it a mountain or a meadow or a brook, or what do you recall?

(Testimony of Donald McKittrick.)

A. Undulating landscape, with bushes on it.

Q. And by whom was the etching?

A. Piazzoni.

Q. Will you spell it?

A. (Spelling): P-i-a-z—possibly two z's—o-n-i.

Q. Where did you get that etching, Mr. McKittrick?

A. That was my wife's before we were married. I believe she had had it a long time.

Q. Where was it in the house?

A. Hanging on the wall in the living room, to the best of my knowledge.

Q. What wall in the living room?

A. That is too much for me to remember, because, you see—I can tell you where it was originally and where I saw it for a number of years. It was moved around.

Q. Where was it the last time you saw it?

A. That, I couldn't say. It used to hang over the mantle. No, it used to hang on the end wall. The watercolor was over the mantle.

Q. The etching was on the end wall, and the watercolor—— [130]

A. I said that is where I originally remember seeing them; where they were when the Wilsons were in there or the Evans—because each tenant moved the pictures around as they pleased.

Q. When was the last time you saw it?

A. When was the last time I saw it?

Q. When the Evans were there, where was it then?

(Testimony of Donald McKittrick.)

A. I cannot tell you. Let's see, now. Wait a minute—no, the last time I saw it was when the Wilsons checked—went—no——

Q. You don't recall?

A. Excuse me, I am going to recall it. Yes, the last time I saw it was when the Evans were there.

Q. When the Evans were there. You don't recall having seen it in that period between the Evans' occupation and the Wilsons' occupation?

A. No.

Q. So that you couldn't say whether or not when the Wilsons moved in——

A. No, I didn't check the inventory.

Q. Now, about the watercolor. What was the subject of that?

A. That was a—call it a seascape. It showed the scene from the landward side.

Q. How large was it?

A. A little larger—I would say that was twelve by eight or nine—fourteen, maybe. [131]

Q. Where did it come from?

A. It was again my wife's property before we were married.

Q. When was the last time you saw it?

A. The same answers that apply to that as apply to the etching, exactly.

Q. So that the same conclusion could be drawn, that you don't remember?

A. The same conclusion could be drawn that I saw it in the latter part of the Evans' occupation.

(Testimony of Donald McKittrick.)

Q. By the way, Mr. McKittrick, what is your business or occupation?

A. I was on the faculty of the University. I took out a leave about a year or two ago.

Q. University of California? A. Yes.

Q. In what department?

A. I am a biochemist. I was in the College of Agriculture, interested in research.

Q. Are you at present employed?

A. That's right.

Mr. Spohn: I have no further questions.

The Court: Any further questions?

Mr. Cornish: No. You can step down.

(Witness excused.)

The Court: Mr. Cornish, how long do you anticipate you will [132] be on direct examination of Mrs. McKittrick?

Mr. Cornish: Maybe fifteen minutes.

The Court: Well, let's proceed with the direct examination. We may have to go over until tomorrow on this matter. I presume you are going to have some rebuttal testimony, are you?

Mr. Spohn: If your Honor please, within your own convenience we would like very much to conclude the matter. Mr. Wilson has an engagement before the Department of Labor tomorrow morning which was put over from today. We will limit our rebuttal as much as possible in order to submit the matter.

The Court: Well, we will proceed to try to get the matter submitted.

Mr. Spohn: Thank you.

BARBARA McKITTRICK

one of the defendants, called in her own behalf, having been duly sworn, testified as follows:

The Clerk: Will you state your name to the Court?

The Witness: Barbara McKittrick.

Direct Examination

By Mr. Cornish:

Q. And you are one of the two defendants, are you, Mrs. McKittrick? A. Yes.

Q. Where do you live?

A. In Walnut Creek.

Q. And you and your husband own the home in Walnut Creek? [133] A. Yes.

Q. And will you just describe the property?

A. My mother owned that home.

Mr. Spohn: May I make the same objection to this line of testimony that I made before, based on the same considerations of the irrelevancy and incompetency and——

The Court: Along the same line, yes. The same objections will be made—the same ruling will be made and your motion to strike for the line of testimony, and I will reserve ruling on the motion.

Mr. Cornish: And I call your attention to the fact that in cross-examination of Mr. McKittrick,

(Testimony of Barbara McKittrick.)

counsel himself questioned Mr. McKittrick as to the same circumstances without any objection on our part, and I think he has waived his motion.

Mr. Spohn: I believe that is erroneous. I asked him nothing whatsoever about Walnut Creek.

Mr. Cornish: I beg your pardon; you asked him about the offer that was made and the rent that was to be paid, the \$180.00 per month. I distinctly heard you.

The Court: Well, let the record speak for itself; and as to this witness, the motion stands, and the question of whether or not you have waived anything is not before me at this time, and I am not going to rule on it until I look at the evidence. I might say here, parenthetically, that I don't recall going into it, but if he did, that can be argued. We will see how it [134] develops.

Q. (By Mr. Cornish): Will you just describe this place in Walnut Creek, Mrs. McKittrick?

A. Well, it has a big garden and has four houses on it. One is a kind of—one, we had built when we moved out there. It was kind—used for storing things, and the other had a two-story building with a library upstairs, and a bedroom downstairs; and the other is a servants' quarters or something like that; and, anyway, it's a room and closet and bathroom and storage room and double garage. It's a good-sized building; and then there is another building where the kitchen and living room and dining room and bedrooms are, and some porches are, and

(Testimony of Barbara McKittrick.)

the main advantage is the garden. That is the most attractive part.

Q. Excuse me. The property surrounding it is about what area?

A. Well, it's about nearly—something like seven acres—between six and seven acres. I think it's six and three-quarters acres.

Mr. Spohn: May the witness be instructed to speak a little more loudly?

Mr. Cornish: Can you speak up?

The Witness: It is about six and three-quarter acres.

Q. (By Mr. Cornish): Now, at or about the time that you met the Wilsons, did you have any inquiries for renting the property in Walnut Creek?

A. At the time we met the Wilsons? [135]

Q. At or about that time.

A. Yes, just before the Wilsons came out, we had had not only an inquiry, but an offer of some people to rent the house, asked us if we could and would take \$180.00 a month and let them move into it.

Q. Now, that was how long before you met the Wilsons?

A. Well, it was just before, because we had already listed it at a real estate place.

Q. You say you listed it?

A. We listed the house at the real estate place and then we decided that we couldn't afford to rent it at one hundred ten, and so we thought we

(Testimony of Barbara McKittrick.)

would take this other offer and move back into it.

Q. Now, you said you listed the house. Which house are you referring to, the Walnut Creek?

A. Oh, no. We hadn't the time to list that. It was just offered at the time the Wilsons came out and asked that if they paid an extra bonus, would we please rent it to them. And so, instead of moving back ourselves and accepting this offer, we allowed them to do that.

Q. All right. Now, before this—you were offered the \$180.00 per month rent for the Walnut Creek house, before that had you listed the Oakmont property for rent? A. Yes, we had.

Q. Do you know how many brokers that had been listed with? [136]

A. No, I don't remember.

Q. Did you handle the listing?

A. Oh, I handle everything in connection with the house.

Q. All right. At what price or what rental did you list it? A. One hundred ten.

Q. One hundred ten. Now, the tenant that was in possession at that time was paying what rent?

A. Mr. Evans?

Q. Yes. I mean before the Wilsons came.

A. He was paying one hundred ten.

Q. And from the time that you first rented this property in August of 1944 up to the time you met the Wilsons, it had always been rented on a lease, had it not?

A. No, I don't think it was always on a lease.

(Testimony of Barbara McKittrick.)

It was a month-to-month rental in some cases, because some of them didn't stay a year.

Q. It was a written agreement?

A. It was a written rental, yes.

Q. A written rental agreement? A. Yes.

Q. Now, it originally was rented at \$150.00 per month? A. Yes.

Q. And then, following the reduction ordered by the Area Rent Control, and up until the time the Wilsons came into the picture, did you charge more than \$110.00 per month? [137]

A. No, we didn't.

Mr. Spohn: I object to that. It is beyond the issues of this proceeding. We are only concerned with the rental that was charged. The tenants Wilson know what the predecessors were charged.

The Court: The objection is sound. I don't see the materiality. There is no allegation here made of any violation.

Mr. Cornish: I think, your Honor, that what has been the practice of these people in the past and whether Mr. Wilson was the one that brought about this violation, whether he was the one that induced it, is certainly material when this Court, in the exercise of the processes of equity, should order restitution, even though the statutory rights have long since passed.

The Court: Well, I am not going to rule the answer out. I will allow the question and answer to stand, but I will say to you, I don't want you to go

(Testimony of Barbara McKittrick.)

further into the field, because I don't think it's material. You have established your point.

Q. (By Mr. Cornish): Now, until Mr. Wilson—until you first talked to Mr. Wilson, had you any idea of renting the Oakmont property for \$110.00 per month?

A. Until I talked to the Wilsons, well, no, we just didn't know what to do. Prices were going up and I knew I couldn't get any more than one hundred ten. I just didn't. We didn't think we should continue any longer, and yet we didn't think we could get any more; and until this offer was made for the place in [138] Walnut Creek, we thought we had better rent it again. And then when we found out we could do better by renting the Walnut Creek place and moving back, we thought that was the wise and best procedure.

Q. You had determined in your mind that you and your husband would move back to Oakmont?

A. Yes.

Q. Before the Wilsons came into the picture?

A. Oh, yes. We told them that.

Q. Now, when the Wilsons came out to the house, did you discuss with them—just relate, if you will, as best as you can recall the conversation, that you had the first time the Wilsons came to the house.

A. We had this offer. When the Wilsons came to the house, we told them that it was no longer for rent. They said something about some other prospective tenants going to come out that hadn't come.

(Testimony of Barbara McKittrick.)

We wouldn't let anybody come out at that time. It was definitely established in our mind that we were going to move back into it again, so they were the only ones that came out, and when they came out, we told them it was no longer for rent, but we hadn't yet had time to telephone the various real estate people and tell them that it was now off the market. But instead—and we told them that was what we were going to do, but they really begged us to let them rent it and give us—and they wrote out a check for \$300.00 and said, "Wouldn't this be a [139] sufficient inducement? We think that the house is well worth that price and we have no objection whatsoever to paying it." And they thought that it was underpriced at one hundred ten, as all the real estate people seemed to think, and everybody that looked at it thought, that it wasn't quite high enough.

Q. Now, did Mr. Wilson write out that check the first time he came out to the house, or the second?

A. Well, he offered it the first time. I don't remember.

Q. When did you first see the check, the three hundred?

A. I can't remember whether that was the first time, or when he wrote that check. I just can't quite remember whether that was the first instance.

Q. You do recall, however, that Mr. Wilson offered to pay rent at the rate of one hundred thirty-five a month on the first occasion?

(Testimony of Barbara McKittrick.)

A. Yes, that was the only reason we considered doing it, although I didn't like to do it like that, either, I was afraid.

Q. Now, did you give Mr. Wilson a definite answer the first night he was there?

A. No, I don't think we did. No, I think not.

Q. Do you recall the statement Mr. Wilson made as he left the house that night? A. Yes.

Q. What did he say?

A. He said, "Please, let us buy your—please let us rent your [140] house," or something like that. He was very anxious to rent it, and so was his wife.

Q. All right. Now, did you get in touch with the Wilsons, or did they get in touch with you following the conversation?

A. They called us again after that and begged us some more, and we had been talking it over.

Q. Now, just a moment, Mrs. McKittrick. Did you get in touch with them, or did they get in touch with you?

A. No, they called us on the telephone.

Q. They called you on the telephone?

A. Yes.

Q. And then, did you call them at any time from the time that you first met at your house and the second time you met, or did they call you?

A. No, we didn't call them between the time we saw them and when they called again and made an arrangement to come out and see us again.

Q. And then they came out on the 13th of July?

A. Well, I guess it was the 13th of July.

(Testimony of Barbara McKittrick.)

Q. Well, they signed a lease on that occasion, and that lease indicated the same day it was signed?

A. It was dated the same day it was signed.

Q. Now, then, do you recall the conversation that occurred on the second day that they came out, on the day the lease was signed? [141]

A. I am confused. What did you say?

Q. Do you remember what was said?

A. What was said the second time they came out?

Q. Yes.

A. To Walnut Creek? You don't mean——

Q. The second time they came out to Walnut Creek.

A. They just begged us again to rent it for that price, and that is all; and I don't know whether it was agreed over the phone to rent it, and that we would accept the three hundred, or whether we decided that after they had got that—I can't quite remember, but in any case, it was consummated the second time they came out.

Q. All right. Now, at that time, at the time that Mr. Wilson gave the check, there was no O.P.A. rental regulations in force?

A. No, that was one of the reasons that they say it would be all right. They said, "Well, there isn't any O.P.A. now. We are perfectly—there is nothing underhand." I was afraid that I was doing something that I could go to jail for, or something, and I said I didn't want to do it now, and they said, "There is no O.P.A. in function at all now,"

(Testimony of Barbara McKittrick.)

and that, "I can certainly give you this three hundred," and——

Q. Mr. Wilson said that, did he?

A. Mr. Wilson said that. So he gave us—and handed to my husband, I think, the check, and there wasn't any O.P.A. then, and that made me feel a little better. [142]

Q. Then, subsequent to that, the Area Rent Control regulations went back into effect?

A. Yes, and so I said—well, it was automatically——

Q. Now, then, you accompanied your husband to the house—to the Oakmont house to talk to the Wilsons some year and a half or more after the lease was first signed?

A. I—at the end of the year, I said to my husband, "Now, what are we going to do? What should we do?" He said, "We should talk to the Wilsons again," and I tried about five times to get in touch with Mr. Wilson, but Mrs. Wilson said he was very busy—and I know he was. He had a new furniture business or something like that in San Francisco that he was moving into, and he said he was working nights, he couldn't see me in the evening or daytime, and we let several months go by. I don't remember whether it was three, four or two, but I think it was three or four months; and then we went over to see them and he said—as my husband quoted him as saying—"This is perfectly agreeable, the set-up that we have at the present is perfectly satisfactory with me. I think the house

(Testimony of Barbara McKittrick.)

is worth one hundred thirty-five and I am perfectly willing to continue paying it," so that was all.

Q. And it was at that time that the extension agreement was signed? A. Yes.

Q. Then, up to that time that the extension agreement was [143] signed, how many checks had you received for \$135.00 per month?

A. I don't remember how many months. I don't think there is any record of what it was. I know it was several. That is all I can say—maybe three.

Q. You mean more than one?

A. Oh, yes, definitely. It may have been four or—I can't just remember whether it was three or four or five or something like that—several months. That is the best I can remember.

Q. Now, did you ever ask Mr. Wilson to send more than \$110.00? A. No, I never did.

Q. And these payments up to the time that the lease—that the extension was signed, came in each month? A. Yes.

Q. All right, as to the payments since that, did you ever ask for more than \$110.00 per month after the extension agreement was signed?

A. No, because it wasn't necessary. They just kept on paying. I mean, they kept on paying; no reason to discuss it. I knew they understood the arrangement. They just kept on staying.

Mr. Spohn: What was that answer? I couldn't hear it.

The Witness: They just kept on sending it.

(Testimony of Barbara McKittrick.)

Q. (By Mr. Cornish): Now, did you or did your husband in your presence ever telephone the Wilsons that you either had applied or were going to apply to the Office of Price Administration or the [144] Area Rent Control for an increase in the rent?

A. No, I did not telephone. I did not, because I had already. They had come out once and they had set it from one hundred fifty down to one hundred ten, and I thought that was very low, and I applied again about when the Creedens, or some people were moving in or out—I forget—and it didn't go through. There doesn't seem to be a record of it. I didn't figure that I could get it, and so I definitely did not make any suggestion. I forget what you said now.

Q. Now, from the time that you made this second application——

A. I didn't tell them that there was any application made, because there wasn't. There was no——wouldn't there be a record of it at the O.P.A.? I didn't make any—I didn't request any, and I didn't tell them I was going to.

Q. All right. Now, then, during any of the time that the Wilsons were in possession, did you make any request of the Area Rent Control for an increase in the rent?

A. No, no, I did not.

Q. Did you when the Wilsons moved out?

A. Yes, I did.

Q. Did you rent to a new tenant after the Wil-

(Testimony of Barbara McKittrick.)

sons moved out before making the petition for an increase in rent?

A. Would you say that again?

Q. Did you rent to a new tenant after the Wilsons moved out before you made your petition for an increase in rent to the [145] O.P.A.?

A. No. A real estate man told me that the O.P.A. was now substantially increasing, whereas they had not done so in the past, and they thought I would be wise to apply again, and so I did apply again and it went through; and then we rented the house to the present tenants. Is that what you want to know?

A. Yes. Now, the increase was to \$130.00 per month?

A. I wanted to be fair and I thought, well, I didn't know what it was worth, although I was advised I could get more, but I didn't want to charge more. Well, I thought it would be around \$130.00—would be a fair price. Maybe it was; I didn't know. I am not a real estate person, but I only asked for one hundred thirty and it went through.

Q. All right. Now, did you at the time that the Wilson moved in—did you check over with them the inventory that is referred to in Plaintiff's Exhibit 3? Did you check over those items in that inventory with the Wilsons?

A. No, I didn't. I should have, but I didn't.

Q. Did you check them over before the Wilsons moved in?

A. Did I? You ask them; I can't remember, I

(Testimony of Barbara McKittrick.)

did it with so many tenants and I can't quite remember. I know that when the Evans moved out, they asked me—they said they hadn't used any of my things, would I please dispense with digging everything out, silverware and dishes and everything—and I liked them very much, and I knew they were trustworthy and I did not. [146] I should have. I saw the things myself and I know some things were there. The rug that my husband was referring to, I did see, and the rugs—and I saw the pictures and I saw some things, but I didn't check through with Mrs. Evans when she left, so I don't know. There may have been some things like dishes and things I didn't—I don't know. There might have been other things. I don't know whether Mrs. Evans took them. I couldn't truthfully say, because I did not check. I don't know—really don't know.

Q. Were these furnishings or furniture the topic of discussion between yourself and the Wilsons?

A. No, I never mentioned it to them. I didn't think I——

Q. Did you mention bringing any of those items down into the house or taking any of it out of the house or keeping any of it? A. No, no.

Q. You didn't yourself? A. No.

Q. Now, in what condition was the house when the Wilsons moved out?

A. When the Wilsons moved out, there was not anything in the downstairs part—but very little. They were right when their attorney said that my

(Testimony of Barbara McKittrick.)

husband has been in and out of the house much less than he has. We both have. And, to him, it wasn't clear what furniture was there and what wasn't. I was the one that took care of that, and I think most all of it was stored in [147] the attic or in the basement. There were just a few pieces oh—in the—I think, as he said, in the breakfast room, furniture, and the kitchen things; and then there might have been a piece or two—but mostly all empty.

Q. Was the davenport in the house—in the living quarters of the house when the Wilsons moved out?

A. No, it was in the basement.

Q. All right, what did you do with the furniture after the Wilsons moved out?

A. What did I do with their furniture? We had a man that was working for us and we had him come out and he—I can't think how we got that davenport up, to tell you the truth, whether it was he, or I, or whether we hired somebody else to get that one piece—I guess it couldn't have been my husband, because he doesn't remember. I can't remember it too well, anyway.

Q. Did you—

A. We had to pull all the furniture, take it down from the attic. The things were—the rugs were rolled in the attic, with the exception of one rose-colored Oriental—American or Oriental that was put on the pool table in the basement, and that was on the basement table—on the pool table. The other rugs, the broadloom rug and the dining-room

(Testimony of Barbara McKittrick.)

rug rolled upstairs in a roll, and all the edges—he didn't see them until I took them down and unrolled them on the floor downstairs, but he [148] could tell by looking that the whole edges were all gone. The moths had eaten the edges and quite far back, about six or eight inches back from the edge and all the rugs that were rolled up there——

Q. All right, what damage was done to the other furniture?

A. There wasn't too much. Well, there seemed—they seemed to be scratched badly from having been stored, and we had a man re-surface them. He had to sandpaper them down and do something or other with them in bringing—making them smooth again and putting on the stain and whatever else he put on them. A mirror, two chairs—I mean, a great big mirror that stands on a floor and in a frame, the grandfather's clock that was badly knocked about, two chairs. I think that is all, and I weave—I know how to weave Oriental rugs because I have done some of it, and I wove back the knots in the rug, and it took me about three weeks solid work, weaving back, and one of them was so bad I couldn't do it, and I turned it underneath and hemmed it so that there was a border along the edge still.

Q. What was the condition of the davenport?

A. It was thoroughly chewed up with moths, and I removed that. It was mohair, and it stuck out, and I took some silk yarn and patched it as well as

(Testimony of Barbara McKittrick.)

I could. I fixed almost all the moth holes so that it would look like something. It was badly——

The Court: Counsel, how much longer will you be on the direct examination? [149]

Mr. Cornish: About a minute.

Q. Now, Mrs. McKittrick, realizing that you did a lot of repairs yourself of the rugs, and of the furniture, what, in your opinion, was the depreciation in value of the furniture and furnishings in the house, resulting from neglect and the failure of the Wilsons to take care of the furniture?

A. You know, really, I can't answer that question. I don't know. I haven't bought any furniture—I don't think I have ever bought any. I don't know. I just don't know what the price was. It was an expensive davenport. My mother gave it to me. She furnished my house when I was married, and I really don't know just exactly what it would be. I don't know. It wasn't a good davenport and I don't think anybody would have bought it the way it looked. It was the cushions, and they were both moldy on both sides of the cushions.

Q. Well, aside from your own time and skill in repairing the furniture, what was your total expenditure for repairs and cleaning the place out?

A. I don't know. I know we paid the man \$50.00 extra, because he worked in the evenings, too. I don't remember. I don't remember now. Let's see. There were things, of course, that had to be bought, you know, little polish and yarn, and cleaning bills and things like that, but I don't—I have

(Testimony of Barbara McKittrick.)

never thought to add it up. My husband took care of that.

Q. All right. Now, there were two pictures missing when the [150] Wilsons moved out?

A. Yes.

Q. Would you describe those?

A. One was a little small etching, signed by Piazzoni, and it was in a small narrow gold frame, hanging by the radio, right near the front door. The other was a large—well, it was in a large frame, a watercolor about this big (indicating)—of a sea, with waves, and white sandy beach, and that was in a big frame, and altogether, it was about that (indicating) big, and it hung over the mantel; and I saw that while the Evans were there, and I think they took that down and stored it in the attic in a large box. I saw some things and those happened to be in some that I did see. I was going to take them out to my place in Walnut Creek because I liked them so well.

Q. Were these pictures there when the Wilsons moved in?

A. When they moved in—or whether they were taken inadvertently. They weren't there when they moved out, that is all I know.

Q. What did you value the watercolor at?

A. I really don't know. I don't know much about what it would be. I haven't any idea.

Q. I don't mean what it would sell for. What do you value it for yourself?

(Testimony of Barbara McKittrick.)

A. I liked it very much. Well, I guess \$200.00 would have been right. [151]

Q. What figure did you value the etching at?

A. Well, somewhere the same. They were very lovely little pictures.

Mr. Cornish: I have no further questions, your Honor.

The Court: It is a way over time. Do you have any cross-examination to make of this witness?

Mr. Spohn: Well, I will tell your Honor what points I have in mind. Perhaps we can resolve them rather informally and get them over with.

The Court: What points do you have in mind?

Mr. Spohn: Well, particularly as to the—this \$300.00 transaction. Is the Court interested in hearing anything more about the circumstances of the circumstances of that?

The Court: I am not particularly interested. I think that the evidence is rather clear. There are some conflicts in the testimony, but I think that this witness is merely corroborative of Mr. Wilson's testimony—rather, of Mr. McKittrick's testimony.

Mr. Spohn: Had we the time, and appreciating your Honor's patience in the matter, I would go into that, but if the record is sufficiently clear in your Honor's mind at this point on it——

The Court: Well, if you have anything to develop on it, you had better develop it, though. Let me, before we get into this cross-examination—I think we ought to take a short recess. We have

(Testimony of Barbara McKittrick.)

overrun the Reporter here, and we will take a five-minute recess and we will come back and go at this properly.

Mr. Spohn: I will appreciate your Honor's indulgence to that extent.

The Court: I want to get the matter disposed of, too.

(A short recess was taken.)

The Court: Mr. Spohn, proceed with the cross-examination.

Cross-Examination

By Mr. Spohn:

Q. Mrs. McKittrick, how old is the house at 111 Oakmont Avenue?

A. Well, I don't know. All I could do is guess. When we moved in, my daughter was a year and a half old. When we moved in it was four years old. Can you figure it out?

Q. You would say that is approximately 25 or 26 years? A. Yes.

Q. That would be 1924 or 25? A. Yes.

Q. How long was the furniture in the house?

A. Some of it was sort of antique, antique type of furniture, various clocks and various things. You would call them antiques, at any rate.

Q. Did you buy the furniture at that time?

A. No, most of the furniture was my—my grandmother collected antique furniture and they left most of that furniture to me. My mother gave me some and my grandmother left me some.

Q. So that some of it, a considerable portion of it, was older [153] than the house, is that it?

(Testimony of Barbara McKittrick.)

A. It wasn't this modern furniture. Older than the house?

Q. Yes.

A. Well, the davenport, my mother bought me after they bought the house for me, a Christmas present one year, and it was a good davenport; but the rug was new—I mean.

Q. New when?

A. Well, it was way newer than the house, some of those rugs.

Q. Well, would you say 1930?

A. No, it was even since then, I think.

Q. 1935?

A. I think it was somewhere along there.

Q. 1935? A. Yes, 1935.

Q. How long did you live there—or let us say this: According to the registration statement which you made in September of 1944, which is in evidence as Plaintiff's Exhibit No. 1, the house was first rented in August of 1944, and had been previously owner-occupied, is that correct, to the best of your recollection? A. Yes.

Q. So that the premises had been rented since about August of '44, is that right?

A. The premises had been rented.

Q. Since about August of 1944? [154]

The Court: That is the Oakmont Street property.

The Witness: You mean it had been rented before that?

The Court: No; from that time on.

(Testimony of Barbara McKittrick.)

The Witness: Yes, yes, yes; entirely, yes.

Q. (By Mr. Spohn): Now, you say there had been a number of tenants between the time that it first went on the rental market and the time that the Wilsons moved in?

A. There had been several tenants. I think I could list them.

Q. And you recall that you said the tenants immediately preceding the Wilsons were named Evans, is that right? A. Yes.

Q. Now, do you recall how long the Evans were there? A. About a year.

Q. About a year? A. It was just a year.

Q. Then, say, approximately from July, '45, until July of '46? A. Yes.

Q. Now, do you recall what furniture was in the house when the Evans moved out?

A. Out? There wasn't any downstairs, very little. As I say, it was stored away.

Q. Stored away?

A. Yes, I looked at it while she was there several times and she had it very carefully stored with these drapes and blankets and things over it. [155]

Q. Did you go in the premises between the time the Evans left and the time the Wilsons moved in?

A. I don't know. I don't think I did. I think they said they were anxious to get—I don't think so. I don't know, they had no—I don't remember. Did I go in? Q. Do you recall?

A. I don't remember. Maybe I did.

Q. To the best of your recollection, Mrs. McKit-

(Testimony of Barbara McKittrick.)

trick, what furniture was in the living quarters of the house when the Wilsons moved in? By the "living quarters of a house," I mean, as I said, when your husband was on the stand, in the rooms in actual use which were occupied.

A. There wasn't any—very little.

Q. Very little?

A. Just like, as I said, the breakfast room table and chairs.

Q. That was that wicker set, wasn't it?

A. Yes.

Q. And then there was a stove, and a——

A. Yes.

Q. ——and a refrigerator in the kitchen?

A. There might have been a piece or two, but it seems to me it was pretty well empty.

Q. And then there was a rug in the front room?

A. That rug in the front room, they had down on a pool table in the basement. [156]

Q. The Evans had it downstairs? A. No.

Q. I am trying to get the picture——

A. There were so many tenants in and out.

Q. ——as to just what was being used for living purposes—— A. Yes.

Q. ——by the tenants at the time the Wilsons moved in. In other words, what was there in use for living purposes?

Mr. Cornish: I am going to object to this line of testimony on the grounds it is incompetent, irrelevant and immaterial. I don't see what difference it makes. The property was listed with the Office of Price Administration, and it was a furnished house,

(Testimony of Barbara McKittrick.)

and it is admittedly there if the tenants saw fit to use it. I don't see what difference——

The Witness: They asked me, "Please leave it in the attic where it is stored, and in the basement," because they had their own furniture, so I did. I didn't ask them to go to the trouble of taking it downstairs again, because——

The Court: Just a moment; now, to keep the record straight, I am going to overrule the objection. At least it will go to the question of damage. Now, you have gotten to it pretty well already. That is, you have gotten to the facts as they are.

Q. (By Mr. Spohn): Now, your husband has testified, Mrs. McKittrick, and you have testified about the damage that had been done to the furniture and about what steps had to be taken to repair it. [157] Now, to the best of your judgment, what was the total amount of damage done to the furniture?

A. It's an awfully hard question. It seems to me it would come to something. I don't know how much my time would be worth. I just don't know. It would have amounted to quite a little bit, I would say. I don't know.

Q. Do you recall——

A. I would have to say I don't know.

Q. Do you recall specifying an amount something in excess of \$1,225.00? A. Did I what?

Q. Do you recall specifying that the amount of damage was something in excess of \$1,225.00?

A. In excess of that? No, I don't think I did.

(Testimony of Barbara McKittrick.)

Q. Do you remember making any such statement?

A. No, I didn't put any price on it. I didn't know what the damage was worth.

Q. Do you recall discussing that matter with Mr. Cornish at the time?

A. My husband did; I didn't. My husband, I believe, discussed with him what he figured the damage to the property was. I don't think I did.

Q. Well, to the best of your recollection, what would you say was the total amount of damage?

A. See, these things were ruined, and if I had to buy them [158] over again, it would have been over a thousand dollars easily with the price they are now. It's awfully hard.

Q. How much did it cost to repair them?

A. See, they were so badly damaged, they aren't worth anything. If you don't count my time as anything, do you mean?

The Court: Giving a reasonable value to your time.

The Witness: How much do people get?

The Court: Well, the witness has said she doesn't know.

Mr. Spohn: We will not press it any further.

Q. Now, directing your attention from the furniture to these paintings, I believe your husband testified that there were two paintings that were missing after the Wilsons moved out, is that correct?

(Testimony of Barbara McKittrick.)

A. After the Wilsons moved out, there were two paintings missing, yes.

Q. One was a watercolor painting and the other was a drypoint etching? A. Yes.

Q. And in response to a question as to what their value was, or how old they were, or where they came from, he said they were your property?

A. They were wedding presents to me, my first wedding.

Q. Have you any estimate—personal estimate as to their value?

A. They came from—well, my people. That is all I can tell [159] you. They were very attractive.

Q. When did you last see those two items? The watercolor—

A. I saw them when the Evans were just getting ready to move. They were packed in boxes. I looked at those particularly. I was planning to take them out to Walnut Creek and substitute in other pictures.

Q. Where were they? A. In a box.

The Court: Where was the box?

The Witness: The box was in the attic.

Q. (By Mr. Spohn): The box was in the attic. Did you ever see them thereafter?

A. No, I didn't. No, I never saw them at all after that. The frame from one of them is up in the attic now, but the picture is gone from it. The glass is still there but the picture is gone, taken from behind it.

(Testimony of Barbara McKittrick.)

Q. The last time you saw them was before the Evans left, and they were in a box in the attic?

A. I don't remember whether they were still there. They were just leaving.

Q. Do you ever remember seeing them while the Wilsons were there?

A. No, I don't remember now whether the Evans had moved at that time or whether they were just moving. I think they were moved; I don't [160] know.

Q. Now, as to the renting of the premises to the Wilsons, do you recall the conversation that was had by your husband and yourself, and Mr. and Mrs. Wilson, about the amount of rent to be paid for the house?

A. Is this the first time?

Q. Yes.

A. We told them it wasn't for rent any more because we were going to move back again.

Q. Had you decided that it wasn't for rent?

A. We thought that when these people offered us \$180.00 for it——

Q. You are talking about the \$180.00 for the Oakmont property?

A. Oh, no, I am talking about Walnut Creek.

Q. When did you receive that offer?

A. Well, we received that——

The Court: Now, which are you talking about?

Q. (By Mr. Spohn): I would like to enquire——

The Court: She said she is talking about the \$180.00 for the Walnut Creek property.

(Testimony of Barbara McKittrick.)

Mr. Cornish: May I call your attention to this line of questions which was the same as was asked Mr. McKittrick.

The Court: The question counsel asked this witness was a question about the Oakmont property, and she answered by referring to the Walnut Creek property.

The Witness: I didn't understand. [161]

The Court: And I want to point out to you that he did not question her about the Walnut Creek property or the price that was asked. It came up in an answer from the witness when she was attempting to explain something, nevertheless. Now, that is why I asked you this question about which property you are talking about.

Mr. Spohn: Yes, I am trying to get at the rental on the Oakmont property.

The Court: Naturally.

Mr. Spohn: And, as you observed, the answer was given on this Walnut Creek property.

The Court: Yes. Well, she says that they decided that they weren't going to rent the Oakmont property again. Isn't that correct?

The Witness: Yes. When the Evans moved out, we didn't know whether we should continue renting at one hundred ten, or what we should do. I listed it. Is that what you want to know?

The Court: I want to know——

The Witness: I cancelled it.

The Court: ——when you decided that you should not rent the property again.

(Testimony of Barbara McKittrick.)

The Witness: Well, as soon as we got the offer.

The Court: For the Walnut Creek property?

The Witness: The Walnut Creek property, then we decided we definitely would not rent the 111 Oakmont property, but would [162] move back into it. It was more convenient for my husband, and it——

The Court: That has been her testimony, the sum and substance of it. She may be a little indefinite in the way she says it, but that has been the sum and substance of it all the way through.

Q. (By Mr. Spohn): Now, do you recall how the Wilsons first happened to get in touch with you about renting the Oakmont property?

A. Well, they called up. I think what she said, they called the Evans, I think, and found out from them how much it was, and then called us; I don't remember.

Q. Who called you? Do you recall?

A. Mrs. Wilson called me.

Q. And Mrs. Wilson spoke to you?

A. Yes.

Q. All right. Now, do you recall what she said?

A. Not exactly. She said she wanted to rent the house; she had seen it—and I think she said she had seen it at that time, liked it and wanted to rent it.

Q. Do you recall what you told her?

A. And at that time, I told her I didn't know what to do, I would have to talk it over with my husband. We didn't know what to do. I said I

(Testimony of Barbara McKittrick.)

didn't know if I wanted to rent it again or [163] what.

Q. At that time, the matter was still open?

A. Well, it was—I think the Evans had been out about—I don't remember how many days, when we got—this man came out and gave us an offer to rent our place out here at \$180.00. It was just about the time that the Evans contacted—I mean that the Wilsons contacted me to rent my house there, and when we got——

Q. Did you tell the Wilsons that the Oakmont property was not then on the rental market?

A. The first time they phoned—I can remember we told them one time. I don't remember whether it was the first time or the second time. I can't remember now whether it was the first time or second time, but——

Q. At the time that Mrs. Wilson called you——

A. I believe it was the second time. I believe it was after she called first that we got this offer of one hundred eighty; and then the second time when he came out, we told them it wasn't going to be rented again. I think that that was it, but I can't quite remember how that worked in. I just can't quite remember. I don't know; we told them it wasn't—no, it definitely wasn't.

Q. When did you tell them it was not in the rental market?

A. The first time or the second time they came out?

Q. Yes.

(Testimony of Barbara McKittrick.)

A. Maybe my husband remembers. I think it was the second time; [164] I don't know.

Q. When was the amount of rental specified, at the first conversation?

The Court: When you talked about the amount of rental.

The Witness: I don't really remember whether it was the first time or the second time. I don't remember. If we had received the offer for one hundred eighty before they came out, then we must have told them the first time they came out. If we received the offer between their visits, then we told them the second time. That is the best I can say because I really don't remember.

Q. But you are not quite certain as to whether——

A. It was just after we received—I don't know, I don't remember when we received that offer—between their first and second visits, I don't remember.

The Court: Well, tell me this: what counsel is trying to get at is, when did you finally agree on a rental price to be paid for the Oakmont property by the Wilsons?

The Witness: You mean before the first time or second?

The Court: No, I want to know when, in your mind, do you recollect that the rental was concluded, that is——

The Witness: I didn't think so until I saw the \$300.00 check he had written out. Whether it was

(Testimony of Barbara McKittrick.)

the second time or the first time—that was the second time, I think. I think that was the second time. I didn't try to remember it. I am [165] sorry. I just don't remember whether this was the first time or the second time, but he wrote it and handed it to my husband. That is when the lease was signed.

The Court: That is when he signed the paper?

The Witness: Yes.

Q. (By Mr. Spohn): Well, now, you recall, I assume, Mrs. McKittrick, the original lease that was entered into?

The Court: Are you referring to defendants' Exhibit C?

Mr. Spohn: Yes, to defendants' Exhibit C.

The Witness: That is all my husband's handwriting. I didn't take care of that part of it.

Q. (By Mr. Spohn): Is that your signature, "Barbara McKittrick"? A. Yes, that is.

Q. Now, directing your attention, particularly, Mrs. McKittrick, to the lower part of the first page of the lease, concerning the term of one year running from the 13th of July, '46, to the 13th of July, '47, at the rent, or sum of \$1620.00, in words, and in figures, and then the "16" scratched out in each instance and the "13" in words written over one place, and the figures "1320" in the other. Do you recall the circumstances of that change?

A. No. My husband was talking about it in the hall. He can't remember just how that came about. It is his writing. I don't know. Do the Wilsons know? [166]

(Testimony of Barbara McKittrick.)

The Court: She says she doesn't know.

Mr. Spohn: All right.

Q. Now, do you recall, Mrs. McKittrick—that is, do you presently recall to the best of your present recollection, the conversation about the amount of rent that was to be charged for the premises?

A. Do I remember—well, I know that I told him that we weren't going to rent it then, and they said just what I already said, and she said that they wanted it very badly and would we please rent it to them, and if they gave us the check for \$300.00, and they said they thought it was worth one hundred thirty-five and there was no O.P.A. and it wasn't illegal, and for us to take it.

Q. Then, is it your testimony that the \$300.00 offer came from them?

A. The offer—they suggested the \$300.00, yes.

The Court: Let me ask this question at this point and see if I understand.

Q. Did they suggest the \$300.00 to make the total rental \$135.00 a month?

A. You mean, now that I—yes, they did. Yes, they did. She said they thought the house was worth hundred thirty-five. They said, "I think the house is definitely worth one hundred thirty-five." He said that, particularly, and so did she.

Q. Now, Mrs. McKittrick, you have testified they said they [167] thought the house was worth one hundred thirty-five, but they gave you a check for \$300.00?

A. Yes.

(Testimony of Barbara McKittrick.)

Q. Now, do you recall the circumstances of how they happened to give you a check for \$300.00?

A. Yes, I did.

Q. What were those circumstances?

A. He said there was no O.P.A., but if the O.P.A. went back, it would look back at the checks coming in that were exceeding the regular rent, and that it would be better, because he said he would be equally guilty as doing that, and that he wanted to do it that way. That was his idea and so he did it.

Q. Who said that? A. Mr. Wilson.

Q. Now, when was that?

A. I don't know whether it was the first or second time. I am awfully sorry.

Q. Was it one of those two meetings?

A. Yes.

Q. (By Mr. Spohn): And you are quite certain that it was Mr. Wilson who said that?

A. It was Mr. Wilson, yes.

Q. Now, do you recall any discussion with them as to the so-called O.P.A. rent ceiling on the house?

A. Well, I told them that it had been rented first at one [168] hundred fifty, and the O.P.A. had reduced it to one hundred ten. Is that what you are getting at?

Q. Well, do you recall telling them that the rental ceiling was then \$110.00?

The Court: She so said just now.

The Witness: Oh, yes, I told them that.

Q. (By Mr. Spohn): Do you recall saying anything to them about having asked the O.P.A. for an increase?

(Testimony of Barbara McKittrick.)

A. No, I didn't say that to them, because I hadn't asked the O.P.A. at that time for an increase.

Mr. Spohn: I think I have no further questions.

The Court: Any further questions, in view of the cross-examination?

Redirect Examination

By Mr. Cornish:

Q. Mrs. McKittrick, when the Wilsons went in, they signed an inventory, did they not?

A. The Wilsons signed an inventory after they had been in a little while, yes.

Q. And they delivered that inventory to you with the signatures on it?

A. I think they made it, or gave it, yes. We have it.

Q. That was the same inventory that had been signed by the previous tenants, the Evans?

A. Yes.

Q. This document which I hand you, Mrs. McKittrick, is that [169] the inventory which was given to you by the Wilsons, with the signature of one of them attached?

A. Well, yes, yes, uh-huh.

Q. Now, the signature—as I noticed, the two signatures in pencil at the bottom of this——

A. Pencil? No, that is pen.

Q. Evans, that is a former tenant?

A. Yes.

Q. And the "B. Wilson" is the signature of either Mr. or Mrs. Wilson?

(Testimony of Barbara McKittrick.)

A. Yes. I don't know whose signature it is.

Q. After they signed it, they turned it over to you? A. Yes.

Q. And that is the inventory that is referred to in the lease? A. Yes.

Mr. Cornish: We ask that this be admitted in evidence as Defendants' Exhibit next in order.

The Court: It may be admitted. Is that Defendants' Exhibit D?

The Clerk: That is D, your Honor, yes.

(The inventory just referred to was received in evidence and marked Defendants' Exhibit D.)

Mr. Cornish: I have no further questions.

Recross-Examination

By Mr. Spohn:

Q. Mrs. McKittrick, do you recall when [170] that inventory was signed?

A. No, I don't. You mean what date?

Q. Yes, about when?

A. Well, it must have been a little while after.

Q. Was it before or after the Wilsons went into the house?

A. Oh, it was after they went in and checked the inventory.

Q. Did you send it to them, or did you take it to them?

A. I don't remember; I didn't see them very much. I guess I mailed it to them.

(Testimony of Barbara McKittrick.)

Q. Do you recall having written them a letter on or about August 10, 1946, in which you asked them to sign a copy of the inventory and send it to you?

A. I can't remember. Maybe I did; I don't know. Maybe we did.

Mr. Yount: Only the first four lines of this are of any materiality. It is all the government is interested. It is getting very late. The rest is a discussion of family matters, which is not pertinent here.

The Court: Counsel has the right to examine the document in its entirety. We are not going to prohibit him from so doing.

Perhaps I might ask the witness if she recalls addressing this envelope?

The Witness: That is my writing, yes.

Mr. Spohn: May I offer this in evidence as Plaintiff's Exhibit next in order? It is stamped from Walnut Creek August [171] 10, 1946, addressed to Mrs. B. A. Wilson, 111 Oakmont Avenue, Piedmont, California, and bearing the sender's name and addressed in the upper left-hand corner, "B. McKittrick, Walnut Creek, California, Box 1321."

The Court: I think the letter and the envelope ought to go in together.

Mr. Spohn: We will hold it for that.

Q. Do you recall writing this letter about August the 10th, 1946?

The Court: Directing your attention particularly to the first part of it.

(Testimony of Barbara McKittrick.)

Mr. Spohn: The first paragraph is the only paragraph that we are interested in.

A. Well, yes.

Q. Signed on the third page, "Barbara McKittrick." A. That's right.

Mr. Spohn: May I offer in evidence, together with the envelope as Plaintiff's Exhibit next in order, a letter addressed to Mrs. Wilson, and reading in the first paragraph:

"Would you like to sign your copy of the inventory and send it to us and let me add the few items to it which I have entered on mine, or have me mail you my copy to sign?"

Mr. Cornish: Are you offering just that part of the letter, counsel, or are you just reading that part at the present [172] time?

Mr. Spohn: I am offering that paragraph.

Mr. Cornish: I will object to that paragraph, your Honor, on the ground that it is only a portion of the document; and I have no objection to the whole letter going in.

The Court: Do you have any objection to the whole letter?

Mr. Spohn: No.

The Court: Well, it will all be admitted into evidence, and the first portion has been read into the record for whatever purpose you desire to use it, and is a portion of the exhibit.

What is the number of the exhibit for that letter and envelope?

(Testimony of Barbara McKittrick.)

The Clerk: Plaintiff's Exhibit No. 4, your Honor.

(The letter to Mrs. Wilson in regard to the inventory was received in evidence and marked Plaintiff's Exhibit No. 4.)

PLAINTIFF'S EXHIBIT No. 4

Dear Mrs. Wilson—

Would you like to sign your copy of the inventory and send it to us, and let me add the few items to it which I have entered on mine? Or have me mail you my copy to sign?

I keep thinking about little Carol and her striped curtains and all and I do feel awfully badly about it. Couldn't she use our bed room furniture? It contains a little cream colored vanity table and chair and you could get little pastel colored curtains—or are there any of ours you would want to use? I told Donald about the suggestion of Carol painting the walls a solid color, and he nearly hit the ceiling. He happens to dislike plain painted walls.

When the water pipe burst in the attic and spoiled our nice new wall paper and ceiling, Mrs. Evans asked me if she might select the new paper. I agreed at once and we both were more than pleased with her choice.

About the little globe which has blown out in the furnace switch. Could you please ask the P. G. & E. man how much a new one will cost before calling an electrician to replace it, as Donald says he can

(Testimony of Barbara McKittrick.)

screw one in in about 2 minutes and a little globe should cost only a few cents. Sometimes electricians make so much of a small job.

I hope your furniture has arrived safely, and we do both hope that all 3 of you will be very very happy at 111 Oakmont.

Me—I am in the middle of fruit drying. I've dried all the fruit from the 10 apricot trees. It looks enough for 10 armies. Next came the prunes and apples and then the pears. Later still the biggest task of all—the wine making.

We will give you a chance to get settled and then we do want you to come out here and spend a Sunday and have Sunday supper with us, or come for dinner during the week and spend the evening.

I am keeping my fingers crossed that Carol will get into college. She'll love it!

Best wishes to all of you.

Sincerely,

/s/ BARBARA McKITTRICK.

[Envelope]

[Cancelled U. S. 3 cent stamp]

[Post Mark]: Aug. 10, 1946.

B. McKittrick,
Walnut Creek,
Calif., Box 1321.

Mrs. B. A. Wilson
111 Oakmont Ave.,
Piedmont, Calif.

Filed December 28, 1950.

(Testimony of Barbara McKittrick.)

Q. (By Mr. Spohn): Now, Mrs. McKittrick, calling your attention to Defendants' Exhibit D, which is the carbon copy of the inventory on these premises at 111 Oakmont Avenue, would you point out the items which you added pursuant to your letter?

A. Let's see, now. Was that four years ago?

The Court: 1946.

The Witness: I am just trying to think four years ago. It wasn't those pictures; they were wedding presents. I don't—really, I would have to take more time to think. [173]

Oh, I know. This was written up, you see, before. That wasn't on it, so I believe the things are in the handwriting, the ones that I added.

The Court: He wants to point out——

The Witness: I think they will be in pencil, the ones that were added.

The Court: Point out which ones were added.

The Witness: This is one green and pink cotton rug, matched chair pillow, two chairs, bureau, or something, and it says something else.

Q. (By Mr. Spohn): Would you say that all of the pencil notations were those that were added?

A. No, but this writing here, that slanting writing is mine. I added those to the inventory when I put them in the house.

Q. Well, would you point out to the Court where the paintings are specified?

A. I will have to look. Let's see. They are done room to room, and it shouldn't be too hard. I will have to go back in it. Watercolor seascape; that is

(Testimony of Barbara McKittrick.)

one. That wasn't a reproduction; it was an original. I see what you are getting at, it was an original. Well, small gold frame etching. Neither of them were reproductions. I wrote that, too. It wasn't a reproduction, it was an original watercolor painting above the mantel. [174]

The Court: Those were the two items that you were referring to?

Q. (By Mr. Spohn): That reproduction is your writing?

A. Yes, it is; it is my writing—but it wasn't—I just don't know why I put it there. It wasn't, though. I don't know if the ditto was mine.

Q. Mrs. McKittrick, I don't recall now whether you previously testified on this point, but I would like to have it cleared up: Between the time the Evans left and time the Wilsons moved in——

A. Yes.

Q. ——did you check the inventory with the actual items in the house? A. No, I didn't.

Mr. Spohn: I have no further questions.

The Court: Any further questions, Mr. Cornish?

Mr. Cornish: No further questions.

The Court: You are excused.

(Witness excused.)

Mr. Cornish: The defendants rest, your Honor.

The Court: All right, the defendants rest. Any further rebuttal?

Mr. Spohn: I would like to call Mrs. Wilson for a short——

The Court: All right, Mrs. Wilson, take the stand. You have been previously sworn. [175]

BEATRICE WILSON

recalled in behalf of the plaintiff, in rebuttal, testified as follows:

Direct Examination

By Mr. Spohn:

Q. Mrs. Wilson, do you recall the items of furniture which were in the living quarters of the house when you moved in? A. Yes.

Mr. Cornish: Objected to as incompetent, irrelevant and immaterial.

Mr. Spohn: On the contrary, I think it goes right to the question of this alleged damage.

The Court: It goes to the measure of damages. Proceed. Overruled.

Q. (By Mr. Spohn): What were those items? Will you state them?

A. The rug that they talked about, the good domestic or Oriental was down on the floor in the living room. There is a companion rug that is a hall rug. You come into the hall living room and the rug was always on the floor. In the kitchen were an icebox and a stove. In the breakfast room were the little wicker table and four chairs; and in the little back bedroom was the Chesterfield—and that the Evans had used as a sitting room or a den—and it was there, and we had a man help Mr. Wilson carry that Chesterfield down into the basement, where it was raised up, because it wouldn't go up

(Testimony of Beatrice Wilson.)

the attic stairs. When we moved in, the McKittricks knew that we were not going [176] to use their furniture. That is why the inventory means so little. Mrs. McKittrick came with me and we went up into the attic after the Evans moved out, before we moved, and she said, "Now, here are the things," and we stood there in the center of the room. It is a big attic room. "Here are the things. Do we want to go through all those boxes?"—and I certainly didn't. And there was some sterling silver there but we didn't open it to look at it. It was all listed on the inventory list. So we looked at each other, and she said, "Do you want to sign it?" And I said, "I am willing to take your word for it if you are willing to take my word for it," and then from then on we didn't touch her things and she knew we weren't using their things. As far as the etchings, I am very sorry, because I take pride in my possessions, and I know she does in hers, and I would be very sorry that I would be responsible for her losing her etching or her painting, but I didn't ever see them.

Q. All right. Now, during the course of time that you were there, did you make any repairs to the premises? A. Yes.

Q. Just what?

The Court: The answer is yes.

The Witness: Yes.

Q. (By Mr. Spohn): Just what work or repairs did you make to the premises?

A. In the kitchen, the sink board, there is a

(Testimony of Beatrice Wilson.)

small sink, and [177] then there is a cupboard and it was just painted, and we bought some red—good linoleum and put it down with stainless steel bands, you know, did a good job to put it down properly.

Q. Did you make any other repairs or improvements?

A. We completely painted the bathroom.

Q. At whose expense?

A. Ours. Mr. Wilson did the painting. We bought the paint. We painted the breakfast room.

Oh, and in the attic, there was a maid's room. We painted that, and we had furniture there and used it as an overflow guest room when we needed it.

Q. During the time that you were in occupancy of these premises, did you spend any money or do anything by way of repairing or cleaning any of the furniture?

A. No, we didn't touch their furniture, but we did spend some money on keeping the house in order.

Q. Before you get to the house proper, did you do anything about the two rugs that have been mentioned?

A. Oh, yes. Their rug was down in the living room and I didn't use that rug, because it was their good rug. We sent it out to be cleaned, and at that time I asked Mrs. McKittrick if she didn't want to send the other rugs that were rolled up in the attic, and she said no, she didn't think so, but I told her that rolled up rugs that were not cleaned were a fine source of moths. [178]

Q. What did you do with the rug that you had

(Testimony of Beatrice Wilson.)

cleaned? Did you continue to use it? A. No.

Q. What did you do with it?

A. Rolled it up and put it down in the basement, wrapped in big paper. When we left, we unwrapped it so they would know where it was, and laid it on the billard table. It was never used. Unwrapped it and laid it there for them to know where it was, the day—our moving day.

Q. Did you do anything about de-mothing the premises? A. Yes.

Q. In other words, did you spend any money or make any efforts to meet the moth situation?

A. Well, I keep my house by having a colored woman come one day a week to do the heavy work and spring cleaning and fall cleaning. I would send her to the attic where she would run the vacuum sweeper, and we bought the Monarch bombs and closed up the windows and shot the bomb around until the whole bomb was expelled, and that is what we did in the attic at times. I saw that moths were there, evidence of them, and I would go up and shoot them. I didn't unroll the rugs, nor did I unfold all the bed rolls and mattresses and things. Mrs. McKittrick knew they were there, knew that they weren't cleaned when put away, or not properly wrapped in heavy paper, and that is the only way I know that moths can be kept out. [179]

Q. Did you let off any of those bombs more than once?

A. Oh, yes. We were there three years, and I cleaned house spring and fall each year.

(Testimony of Beatrice Wilson.)

Q. So that, at least twice a year, you de-mothed the place?

A. Yes. Personally, I didn't go up there and wield the vacuum sweeper myself. I don't do that.

Q. When you left the premises in November of 1949, did you clean them out, or have them cleaned out?

A. I didn't touch their things. I cleaned our things.

Q. When you say, you didn't touch their things—— A. In the attic.

Q. Did you have anything done downstairs in the living quarters?

A. Oh, yes. Mrs. McKittrick came the day that we were moving. I mean, the movers were going in and out with things, and I asked her to come back the next day, we were still in a mess. You know how upsetting it is. And the next day, it was raining very, very hard, and my colored woman and I went there and the two of us went through the whole house and we cleaned it thoroughly. I mean, we swept out every little bit of trash and burned it in the fireplace, the only place to burn it. It was cold and wet.

Q. Did Mrs. McKittrick come in that day?

A. Not while I was there. I don't know. I left the key on the mantel. They knew I was leaving it there; that was prearranged. [180]

Q. Now, during the time that you were there, did you do anything to the garden? A. Yes.

Q. What?

(Testimony of Beatrice Wilson.)

A. We had a gardener who came once a week. He also works for the Fergusons next door.

Q. Do you know his name?

A. Oh, yes, he still works for us.

Q. What is his name? A. Jack Kopp.

Q. Where does he live?

A. I have his address written at home. He is an old Dutchman and he is a very neat man, and he kept the shrubs and the lawn cut very neatly, we thought. We were surprised to hear——

Q. Did he come regularly while you were there?

A. Once a week.

Q. Did you have him do any work when you left?

A. No, because he had been coming once a week, and it was all neat—I mean, we thought it was.

Mr. Spohn: I have no further questions of Mrs. Wilson.

The Court: Any further examination?

Cross-Examination

By Mr. Cornish:

Q. You didn't do any de-mothing in the attic yourself? [181]

The Court: She said so already, counsel.

The Witness: I said I did not do the vacuuming; I don't do vacuuming.

Q. (By Mr. Cornish): You did the de-mothing?

A. Yes. It doesn't take any physical effort to put your finger on a bomb.

Mr. Cornish: I have no further questions.

Mr. Spohn: I would like to recall Mr. McKittrick for one question.

The Court: As an adverse party?

Mr. Spohn: No, I am sorry. I would like to recall Mr. Wilson.

The Court: All right.

(Witness excused.)

BRUCE A. WILSON

recalled in behalf of the plaintiff, in rebuttal, testified as follows:

Direct Examination

By Mr. Spohn:

Q. Mr. Wilson, you have already heard the testimony today; you have been here. Do you recall exactly what happened at the time you had the conversation about renting the house in July of 1946?

Mr. Cornish: Objected to, if the Court please, as having been asked and answered on direct.

Mr. Spohn: If your Honor please, there is some controversy, [182] some difference in testimony, and I should like to question this witness precisely as to what happened, so that it may be clear. The plaintiff's position——

The Court: The objection, technically, is sound. In other words, as I understand the purpose of rebuttal is not to reiterate what he said on direct; it is to answer new contentions that have been made, or new statements that have been made on the defense case.

Mr. Cornish: All right.

(Testimony of Bruce A. Wilson.)

The Court: And if he has already testified as to what happened, he would have to do it again. Saying it twice doesn't prove it any more.

Mr. Spohn: In the light of the Court's statement, I will ask these specific questions.

Q. When you went to rent the premises from the defendants, did you offer to give them \$135.00 a month for the premises. A. No.

Mr. Cornish: Objected to as having been asked and answered on direct.

The Court: I will overrule that objection. It wasn't put that way. The answer is no and it will stand.

Q. (By Mr. Spohn): Did you offer to give them—to give the defendants \$300.00 in advance?

Mr. Cornish: I object to that, if the Court please.

The Witness: No. [183]

Mr. Cornish: As having been asked and answered, and on the further ground that it is leading and suggestive.

The Court: Just a moment, I want to find out, did you finish the question?

Mr. Spohn: Yes.

The Court: I will overrule the objection so we will get the testimony before us. The answer is no?

The Witness: No.

The Court: Let it stand.

Q. (By Mr. Spohn): Did you say to the defendants that the O.P.A. was not then in effect and that

(Testimony of Bruce A. Wilson.)

it would be perfectly all right for you to give them a check for \$300.00?

A. If you make it in two questions, I will answer the first part of the question, no—the first part, yes, and the second part, no.

Q. Well, what——

Mr. Cornish: Would you read the question and answer, please?

The Court: You had better understand the question now.

(Question and answer read.)

The Witness: Definitely, no.

Mr. Spohn: No further questions.

The Court: You may cross-examine.

Cross-Examination

By Mr. Cornish:

Q. You say you did make the statement that the O.P.A. was not in effect? [184]

A. I believe I did. I think there was a general discussion on the subject at the time, because it was just a matter of record in the newspapers.

Q. Why did you give a check for \$300.00 in advance if the O.P.A. wasn't in effect?

A. I was asked for it.

Q. You were asked for it? A. Yes, sir.

Q. Why didn't you right then insist on that being put in the lease that was signed?

A. I don't know why I did or did not.

(Testimony of Bruce A. Wilson.)

Q. Did you ask Mr. McKittrick to put it in the lease? A. No.

Q. You know the lease was changed to reduce the amount of rent from sixteen hundred twenty to thirteen hundred twenty, don't you?

A. I can't answer that question.

The Court: Well, he asked you if you knew that. Did you or didn't you?

The Witness: No the lease was written out—this first lease that has been submitted, was written out.

The Court: Are you talking about the one that Mr. McKittrick had?

The Witness: That is correct.

The Court: Yes. [185]

The Witness: When we got there the second night, and as a result of the discussions, if my memory serves, it was changed and I initialed the changes which brought about the check for one hundred ten, plus the check for three hundred.

Q. (By Mr. Cornish): Did you ask Mr. McKittrick to change the lease to provide that you paid him \$300.00 cash? A. No, I did not.

Q. Did Mr. McKittrick offer to change the lease to show that you had paid him \$300.00 in cash?

A. I don't recall that he did.

Q. And you knew at the time that you gave that check and at the time you signed the lease, that the lease provided for the payment of \$300.00 less rent than you intended to pay? A. No.

Q. Well, you intended to pay \$300.00 rent?

(Testimony of Bruce A. Wilson.)

A. I intended to pay \$135.00 per month.

Q. All right, and the lease provided for thirteen hundred twenty, didn't it?

A. Originally, sixteen hundred twenty.

Q. When you signed it, it provided for thirteen hundred twenty? A. That is correct.

Q. All right. Then, you knew that the lease provided for \$300.00 less rent than you intended to pay?

A. That's right. [186]

Q. All right. Now, why did you sign a lease providing for \$300.00 less rent than you intended to pay?

A. Go back to the question you asked me earlier in the afternoon, and the answer was that we were told that the O.P.A. at that time—had given them telephone approval for an advance, and the advance was, as it developed, to \$135.00 a month, and that the paper work needed to be done, and would we therefore put up a check of \$300.00 covering the difference until such time as that was completed.

Q. Did you believe that? A. Yes, I did.

Q. Didn't you testify just about two minutes ago that you knew the O.P.A. wasn't in force?

A. At that particular time, it was rumored that it would be out for a week, and back in a week. If you look in the papers, it is very well covered.

Q. It was in force at the time, wasn't it?

A. That is correct as far as I know.

Q. Then, the matter of whether they had an application pending wouldn't make any difference in

(Testimony of Bruce A. Wilson.)

the amount of rent that you paid at that time, would it? A. I wouldn't—

Mr. Spohn: Objected to as calling for a conclusion, and it is argumentative.

The Court: He said he didn't know, so it wouldn't make [187] any difference.

Mr. Cornish: I have no further questions.

Mr. Spohn: No further questions.

The Court: I want to ask this witness a question before we get any further:

Q. Mr. Wilson, in regard to this situation about your understanding of what the situation was with the O.P.A.— A. Yes.

Q. —was it your understanding that the O.P.A. regulations were not in effect but that they were coming back into effect right away?

A. Judge, if I recall, there was an announcement made, or rather, the O.P.A. ran out—

Q. On June 30.

A. —I guess that was at the same time; I am not sure. But in any event, that it was a matter of some very short period when it would be renewed, because it hadn't had an opportunity to go through the Congress at that time, and that there was never any question but what it would not be back on.

Q. All right. Was that what you meant when you said that you knew that the O.P.A. was not in effect at that time?

A. That's right. There was a lapse of maybe a week or ten days when, if my memory serves, when it was not in effect.

(Testimony of Bruce A. Wilson.)

The Court: All right, I have no further questions.

In view of the questions that the Court has asked, counsel, [188] does counsel desire to ask any further questions?

Mr. Spohn: No.

Cross-Examination
(Continued)

By Mr. Cornish:

Q. Notwithstanding the fact that you knew the O.P.A. was not in effect, it is still your statement—your testimony, that they told you that they had asked for an increase?

A. They told us that they had a telephone okay for an increase in the rent.

Q. Whom did they tell you they got the O.P.A. from? A. What.

Q. Did they tell you the O.P.A. wasn't in existence? A. No.

The Court: That is argumentative.

Q. (By Mr. Cornish): Let me put it this way: did you ask them from whom they got the approval?

A. No, it was volunteered information.

Q. All right. Whom did you think they got it from?

A. I just said I assumed it was the O.P.A. That is what we were told.

Q. Did you discuss with them the fact that they couldn't get approval from the O.P.A. if it didn't exist? A. No.

(Testimony of Bruce A. Wilson.)

Q. You didn't discuss that? A. No. [189]

Q. Now, all this time that you were paying this \$135.00 per month, you knew you were paying above ceiling rent, didn't you? A. No, I did not.

Q. You are sure of that? A. Yes, sir.

Q. Were you ever notified by the O.P.A. that the rent had been increased? A. No, sir.

Q. Had you ever asked the O.P.A.?

A. No, sir.

Q. You just stayed completely away from them until you moved out of the place?

A. That is correct, I did. I had no reason to go to them.

Mr. Cornish: I have no further questions.

The Court: The witness will be excused.

Mr. Spohn: No further questions here.

(Witness excused.)

The Court: Do you rest? Do you have anything in the nature of surrebuttal?

Mr. Cornish: No, your Honor.

Mr. Spohn: If your Honor, there is but one point. I think it is almost beyond mention, but in order that the record may be complete, to clear up this point about any telephone approval by O.P.A.—

The Court: Do you have a witness here? [190]

Mr. Spohn: Yes.

The Court: In rebuttal?

Mr. Spohn: Yes. The facts were these, your Honor——

Mr. Cornish: Who is contending there was any telephone approval by O.P.A.? We haven't.

The Court: That is right; they have denied that there was a telephone approval.

Mr. Cornish: We have denied we said anything about it, and I know perfectly well the O.P.A. couldn't approve an increase by telephone.

The Court: Well, that would be impeaching your own witness, counsel.

Mr. Spohn: We will rest.

Mr. Cornish: We rest, too. I assume your Honor doesn't want argument at this time?

The Court: Other than in writing. I do want your theories argued. I don't want any Philippiacs on the subject, but I do want a concise statement on the facts and the law. The plaintiff will have the privilege of opening and the defendants will respond and the plaintiffs close. I presume, however, that the main points at issue here are going to be raised by the defense rather than by the plaintiff. The theory of the Plaintiff's case has followed the same pattern as most of these rent violation cases.

Now, Mr. Cornish, if you would desire to assume the burden [191] of the opening brief—if you don't object, Mr. Spohn—I would prefer to see it that way—have you state the theory of your case, that is, your defense.

Mr. Cornish: For the convenience of the Court, I would just as soon do it, but with other matters that I have in the office, it would be impossible for

me to file an opening brief before the 20th of January.

The Court: I see.

Well, then, we had better follow the regular procedure.

Mr. Cornish: I have no objection to filing the first one, but I have got an appeal that I am taking from the United States District Court in Nevada and it is going to take quite a lot of time, because in designating the record, there is a lot of duplicate exhibits that have to be eliminated, and I would hate to promise your Honor that I could get it in in ten days. My time is up on the 12th of January.

The Court: Well, let's follow the orderly fashion, and ten, ten and five, that will be January 10, January 20, and January 25. Does that meet with your approval?

Mr. Cornish: Yes.

Mr. Spohn: Yes, your Honor.

The Court: The case will be continued for submission, counsel will present briefs, the plaintiff's opening brief due on January 10, the defendants' reply brief due on January 20, and the plaintiff's closing brief on January 25, and the matter [192] will be continued for submission until January 26—Friday, January 26.

Now, insofar as submission is concerned, it is not necessary for counsel to be present, but it is going to be continued to that day and will come up on the calendar and will be submitted unless there is some further argument that is to be made in view of the briefs; and if there is, why, I would ask counsel

to notify the clerk of this Court so I will know if there is going to be any further argument, but I don't anticipate that there should be. It will then be submitted and decided.

Mr. Cornish: Yes. I take it your Honor is concerned more with the brief on the law than the brief on the facts?

The Court: That's right.

Mr. Cornish: And there are certain conflicts of fact, that you don't want us to argue?

The Court: If you want to argue any of the factual portions of the evidence that has been introduced here, you may do so. I am not going to foreclose you.

Mr. Cornish: I will argue loud and long why your Honor should believe my clients instead of the other side.

The Court: I know, but what I am most interested in is your theory of the law here that you raised. I will frankly say that you have raised what is a rather novel defense to these proceedings and I want to see them sustained in law, because you [193] must well know that these cases come through these courts, numbers of them, from this Southern Division of the Northern District, and that the courts are therefore familiar with this type of proceeding; and since you raised the points, I expect you to assume the burden of establishing your defense in law.

Mr. Cornish: The points your Honor, I believe brought out in that Porter case in which there were a number of different overcharges for which they sought to make restitution, and after hearing the

facts, the Court only ordered restitution in two, and the opinion brings out the reason.

The Court: There are a number of cases on this restitution, and I want your competent analysis of the cases in order to give the Court a fair view of your theory. Now, if we started to review all the cases on this subject, I would run into hundreds of cases.

Mr. Cornish: I appreciate that.

The Court: Because they have been appealed in every Circuit in this country, and I think every Circuit has a number of cases on the subject from a number of aspects, so I want a brief statement on the law and of your cases in point as nearly as possible. That is the order upon which this matter will be continued for submission, and I don't want to the briefs any more lengthy than possible, but I don't want to limit you in your arguments.

Mr. Cornish: Would you prefer that we merely cite the [194] authorities or that we quote the pertinent parts of the decisions?

The Court: That depends on what you think demands emphasis.

Mr. Cornish: Does your Honor prefer to read the case?

The Court: It depends on whether or not you are citing cases that are—I prefer you to use your own judgment on what you think is important—

Mr. Cornish: Fine.

The Court: —to develop your own theory. We have read a considerable number of cases. We read them when different problems come before us, but

you can't tell what is in my mind, and I want you to use your own judgment.

Mr. Spohn: We understand, your Honor.

The Court: And the Court will be at recess.

Certificate of Reporter

I Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 195 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ C. E. MONEYHUM.

[Endorsed]: Filed September 4, 1951. [195]

In the United States District Court for the Northern
District of California, Southern Division

No. 29940—Civ.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DONALD McKITTRICK and BARBARA McKIT-
TRICK,

Defendants.

**CERTIFICATE OF CLERK TO RECORD
ON APPEAL**

I, C. W. Calbreath, Clerk of the United States
District Court for the Northern District of Cali-

fornia, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, or true copies of orders entered therein, in the above-entitled case and that they constitute the record on appeal herein as designated by the attorney for the appellant:

Complaint for injunction, etc.

Answer.

Plaintiff's request for admissions.

Reply to request for admission of facts.

Plaintiff's interrogatories.

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In Witness Whereof I have hereunto set my hand

and affixed the seal of said District Court this 10th day of September, 1951.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 13088. United States Court of Appeals for the Ninth Circuit. Donald McKittrick and Barbara McKittrick, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed September 11, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
Case No. 13088

DONALD McKITTRICK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO RELY ON APPEAL

In presenting their appeal, defendants and appellants intend to rely upon the following points:

1. The tenants admitted instigating and inviting the overcharges, and it was error to grant treble damages;

2. This was an action for restitution. The burden was on the plaintiff below to show a good reason for restitution. The trial court erroneously relieved the plaintiff below from that burden and placed upon defendant below the burden of showing a good reason why restitution should not be granted;

3. There was evidence before the trial court sufficient to sustain a judgment denying restitution which might have been controlling had the court not erroneously shifted the burden of proof.

Dated September 18, 1951.

/s/ FRANCIS T. CORNISH,
Attorney for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 19, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF THE
RECORD TO BE PRINTED ON APPEAL

Appellants hereby designate the following portions of the record to be printed to constitute the record on appeal herein:

1. The complaint;
2. The answer to the complaint;
3. The findings of fact and conclusions of law;
4. The Judgment;
5. The motion for new trial;
6. The order denying motion for a new trial;
7. The notice of appeal;
8. The designation of portions of the record to be included in the record on appeal;
9. The statement of defendants filed under Rule 75-d;
10. The order extending time to docket appeals;
11. The following portions of the reporter's transcript of the trial:

* * *

12. The following exhibits:
Plaintiff's Exhibit 2;
Defendants' Exhibit C.

Dated September 18, 1951.

/s/ FRANCIS T. CORNISH,
Attorney for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 19, 1951.

[Title of Court of Appeals and Cause.]

COUNTER-DESIGNATION OF CONTENTS OF
RECORD TO BE PRINTED ON APPEAL

Comes now the United States of America, Appellee in the above-entitled cause, and designates the following portions of the record to be printed on appeal:

1. Plaintiff's Request for Admissions.
2. Defendants' Answer to Plaintiff's Request for Admissions.
3. Plaintiff's Interrogatories.
4. Defendants' Answer to Plaintiff's Interrogatories.
5. All portions of Reporter's Transcript of Testimony and Exhibits not included in Appellants' Designation of Record to Be Printed.
6. Appellants' Designation of Portions of Record to Be Printed.
7. Appellee's Counter-Designation of Contents of Record to Be Printed on Appeal.

Dated this 26th day of September, 1951.

/s/ SIDNEY FEINBERG,
Attorney for Appellee.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 26, 1951.

No. 13,088

United States Court of Appeals
For the Ninth Circuit

DONALD McKITTRICK and BARBARA
McKITTRICK,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

FRANCIS T. CORNISH,
2140 Shattuck Avenue, Berkeley 4, California,
Attorney for Appellants.

FILED

DEC 10 1951

PAUL P. O'BRIEN
CLERK

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No. 13,088

United States Court of Appeals
For the Ninth Circuit

DONALD MCKITTRICK and BARBARA
MCKITTRICK,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

This is an appeal taken pursuant to Rule 73 of the Federal Rules of Civil Procedure. The judgment was rendered and entered under Rule 54 on the 11th day of May, 1951 (Tr. 35-37). Defendants served a motion for a new trial under Rule 59 on the 21st day of May, 1951 (Tr. 37-38). On the 4th day of June, 1951, His Honor, Judge Carter, denied the motion (Tr. 39) and on the 9th day of July, 1951, defendants filed their notice of appeal (Tr. 40). The time for docketing the record on appeal was enlarged by order until the 17th day of September, 1951 (Tr. 42). The appeal was docketed on the 11th day of September, 1951 (Tr. 239).

Jurisdiction of the action is based on Sections 205 and 206 of the Housing and Rent Act of 1947, as amended (50 U.S.C.A. app. 1881-1906).

STATEMENT OF FACTS.

Barbara and Donald McKittrick, the defendants and appellants, owned two houses, one at 111 Oakmont Avenue, in Piedmont, and one in Walnut Creek (Tr. 140, 177). They lived in Walnut Creek and rented their home in Piedmont. When the home in Piedmont was first rented, the rental was \$150 per month (Tr. 64-65). The area rent control reduced this to \$110 per month (Pl. Ex. No. 1; Tr. 61) and they continued to rent it for that figure until about the beginning of July, 1946, when the tenant gave notice of departure (Tr. 180-181). The McKittricks then listed the house for rental at \$110 per month (Tr. 180). From one of these listings, Bruce A. Wilson learned of the house, went to the tenant and found the name and address of the owner, and he and Mrs. Wilson went to discuss the matter with the McKittricks at Walnut Creek (Tr. 130-131).

At that time the McKittricks had been offered \$180 per month rental for their Walnut Creek home and had decided to rent it and move into the Piedmont house (Tr. 143-145; 182-183; 204-205). The Walnut Creek house rental was not under control, and for this reason the McKittricks had decided to move into

the Piedmont house, thereby increasing their income by \$70 per month.

Wilson admitted that the Piedmont house was worth more than \$110 per month and he offered to pay \$135 per month (Tr. 146; 183-184), called the McKittricks' attention to the fact that rent controls were then not in force in Piedmont (Tr. 185-186), and offered to pay \$300 cash in advance as a bonus to induce the McKittricks to refrain for one year from occupying the Piedmont house themselves (Tr. 151). After considering the matter, the McKittricks decided to stay in Walnut Creek, thereby increasing their living costs by \$45 per month over what they would have been had they moved into the Piedmont house.

The parties drew up a lease. As first drawn it was a one-year lease at \$135 per month, but was altered to a one-year lease at \$110 per month (Tr. 149-151). In this form it was signed (Tr. 27-30). It contained a provision that if the tenant held over, the tenancy was from month to month on the same terms (Tr. 29).

At the end of the year the Wilsons stayed on. They voluntarily paid rent at \$135 per month for two or three months (Tr. 152). Then they met and both parties signed an extension under the same terms for another year (Tr. 152; Pl. Ex. No. 3; Tr. 94). Wilson continued to pay \$135 per month, not only for that year, but for the balance of the time he was in possession (Tr. 152-155; 186-187). Wilson never protested, and the McKittricks never asked for anything but

the \$110 per month rent specified in the lease and allowable under federal rent regulations (Tr. 152-155; 186-187).

As soon as the Wilsons moved out, the McKittricks applied to the Area Rent Control Office for an increase in the rental ceiling. This was promptly done to increase it to \$130 per month (Tr. 77-78). No application was made while the Wilsons were there.

ASSIGNMENT OF ERRORS.

The Court made no findings of fact on the issue of restitution. The Court concluded:

“That the Defendants have failed to satisfactorily show why the equitable power of this Court should not be exercised, or to satisfactorily assume the burden of proving that the acceptance of the overcharges within the year immediately preceding the filing of the complaint herein was not wilful nor the result of failure to take practicable precautions against such occurrence.”
(Conclusions of Law, No. 5; Tr. 33.)

Otherwise the findings are simply routine. They find no facts as to what may have been the equities concerning restitution.

The Order for Judgment states:

“* * * and the defendants have failed to satisfactorily show why the equitable powers of this Court should not be exercised, or to satisfactorily assume the burden of proving that the acceptance

of the overcharges within the year immediately preceding the filing of this complaint was not wilful.”

That the Court failed to find as to the equities concerning restitution, and that the Court shifted the burden upon the defendants to show that restitution should not be made, instead of placing upon plaintiff the burden of proving that restitution should be made, was fully called to the attention of His Honor, Judge Carter, and he declined either to grant a new trial or to correct his findings (Tr. 39).

It is admitted that the McKittricks received \$300 when the lease was signed, and it is admitted that each month after the first year Wilson paid and the McKittricks received \$25 more than the ceiling rental. We have set forth the facts most favorable to the defendants because the trial judge has not told us:

1. Whether Wilson or McKittrick induced the overpayments;

2. Whether McKittrick made any threats of eviction or otherwise if the extra money was not paid;

3. Whether the premises were reasonably worth more than \$110 per month during any of the period involved, as the Area Rent Control found they were immediately afterwards;

4. Whether the McKittricks actually sustained a loss of \$1800 on rentals while the Wilsons were there;

5. Whether the McKittricks will sustain a loss of \$2800 on rentals if restitution must be made.

We merely point out to the Court that there is evidence in the record from which the Court could have found, consistent with all of the other findings, that Wilson induced McKittrick to enter into the tenancy and voluntarily paid \$25 per month more than the ceiling rental in order to induce the McKittricks not to take possession of their own home, which they had the legal right to do, and that the McKittricks have actually lost \$1800 on the Wilsons so far and if restitution is granted will lose \$2800, while the Wilsons occupied premises worth, at the last part of the term, \$130 per month, for which they will only have to pay \$110 per month. And the Court denied permission to prove that the reasonable rental value was more than the ceiling rental value.

The first error complained of is the trial Court's finding that it was incumbent upon defendants to prove that they should not restore money which was paid to them in the face of a contract which would have been an absolute legal bar in an action at law to any recovery of the sum so paid, instead of requiring plaintiff to prove that the equities demanded that money paid by a mere volunteer (from the legal standpoint) should be restored to him.

The second error of which appellants complain is the portion of the judgment ordering defendants to pay, in effect, a total of four times the alleged overcharges collected over a three months period; it is

appellants' contention that the maximum total refund which can be ordered paid by defendants—either by way of damages or by way of restitution—cannot in the aggregate exceed three times the total overcharge collected by the landlord in any given period.

THE BURDEN OF PROOF WAS ON THE UNITED STATES.

This is not an action brought to recover the money paid in excess of the lawful ceiling rental. Such an action would be brought pursuant to the provisions of the damage section of the Housing and Rent Act. That statute provides:

“Recovery of damages.—Any person who demands, accepts, or receives any payment of rent in excess of the maximum rent prescribed under section 204 shall be liable to the person from whom he demands, accepts, or receives such payment (or shall be liable to the United States as hereinafter provided), for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amount of (1) \$50, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceed the maximum rent which could lawfully be demanded, accepted, or received, whichever in either case may be the greater amount: Provided, That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation. Suit to recover such amount may be brought

in any Federal, State, or Territorial court of competent jurisdiction within one year after the date of such violation: Provided, That if the person from whom such payment is demanded, accepted, or received either fails to institute an action under this section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the United States may institute such action within such one-year period. If such action is instituted, the person from whom such payment is demanded, accepted, or received shall thereafter be barred from bringing an action for the same violation or violations. For the purpose of determining the amount of liquidated damages to be awarded to the plaintiff in an action brought under this section, all violations alleged in such action which were committed by the defendant with respect to the plaintiff prior to the bringing of action shall be deemed to constitute one violation, and the amount demanded, accepted, or received in connection with such one violation shall be deemed to be the aggregate amount demanded, accepted or received in connection with all violations. A judgment in an action under this section shall be a bar to a recovery under this section on any other action against the same defendant on account of any violation with respect to the same person prior to the institution of the action in which such judgment was rendered.” (June 30, 1947, c. 163, Title II, § 205, 61 Stat. 199; Mar. 30, 1949, c. 42, Title II, § 204, 63 Stat. 27.)

This action was commenced on the 3rd of August, 1950. Only \$405 was paid in rent after August 3,

1949, and this sum so paid exceeded the ceiling rental by only \$75 (Plaintiff's Exhibit A; Tr. 9).

By this action the Government seeks to recover in all \$1000 paid in excess of the ceiling rental, of which \$925 was paid before August 3, 1949. Any action for the recovery of this sum is barred.

The Government, however, places their right of recovery on the broad principles of restitution authorized by the prohibition and enforcement section of the Housing and Rent Act. The United States Supreme Court has held that this section authorized an equitable action for restitution, even after any recovery in an "action of law" is barred by the statute (*Porter v. Warner Holding Co.* (1945), 328 U.S. 395).

In that decision the Supreme Court points out two things:

1. The fact that the statute has barred a legal action does not prevent restitution.

"* * * An order for the recovery and restitution of illegal rents may be considered a proper 'other order' on either of two theories:

"(1) It may be considered as an equitable adjunct to an injunction decree.

* * * * *

"(2) It may be considered as an order appropriate and necessary to enforce compliance with the Act."

Porter v. Warner Holding Co. (1945), 328 U.S. 395, 399.

2. The recovery is based upon the equitable principles of restitution and depends upon the peculiar facts of each case.

“Restitution, which lies within that equitable jurisdiction, is consistent with and differs greatly from the damages and penalties which may be awarded under § 205 (e). *Bowles v. Skaggs*, supra ((CCA 6th) 151 F. 2d 821). When the Administrator seeks restitution under § 205(a) he does not request the court to award statutory damages to the purchaser or tenant or to pay to such person part of the penalties which go to the United States Treasury in a suit by the Administrator under § 205(e). Rather he asks the court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant. Such action is within the recognized power and within the highest tradition of a court of equity.”

Porter v. Warner Holding Co. (1945), 328 U.S. 395, 402.

Porter v. Warner Holding Company does not hold that there is an absolute right in the United States to a decree of restitution in every case in which there has been a rental overcharge above the legal ceiling. It merely reversed the lower Court in refusing to take jurisdiction to hear the case and directed the lower Court to determine whether restitution was in order.

“* * * The case must therefore be remanded to that court so that it may exercise the discretion that belongs to it. Should the court decide to issue a restitution order and should there ap-

pear to be conflicting claims and counterclaims between tenants and landlord as to the amounts due, the court has inherent power to bring in all the interested parties and settle the controversies or to retain the case until the matters are otherwise litigated.”

Porter v. Warner Holding Co. (1945), 328 U.S. 395, 403.

The holding of *Porter v. Warner Holding Co.* being that restitution MAY be granted, we come to the question, SHOULD restitution be granted?

The subject of restitution has been fully treated by the Supreme Court in *Atlantic Coast Line R. Co. v. Florida* (1934), 295 U.S. 301.

In that case, the Utility had charged and collected rates which were unlawful. It collected on the basis of a Public Utilities' Commission regulation which ordered it to do so, but which was later held void. None of the money for which restitution was sought could have been legally collected by the Utility in the first place had the persons who paid the freight rates objected to their payment or questioned the validity of the regulation under which they were paid. Nevertheless, the Court inquired into all the circumstances and concluded that it was fair that a part of the money so collected be restored, but it was inequitable to order it all to be restored.

“* * * A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function * * * The claimant to prevail must

show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it. * * * The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it."

Atlantic Coast Line R. Co. v. Florida (1934),
295 U.S. 301, 309-310.

"Suits for restitution upon the reversal of a judgment have been subjected to the empire of that principle like suits for restitution generally. 'Restitution is not of mere right. It is ex gratia, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it, nor where the process is set aside for a mere slip.' (Gould v. McFall, 118 Pa. 455, 456, 12 A. 336, 4 Am. St. Rep. 606, citing Harger v. Washington County, 12 Pa. 251. There are other decisions to the same effect. Alden v. Lee, 1 Yeates, 207; Green v. Stone, 1 Harr. & J. 405; State ex rel. Hayden v. Horton, 70 Neb. 334, 97 N.W. 434, 99 N.W. 501; Teasdale v. Stoller, 133 Mo. 645, 652, 34 S.W. 873, 54 Am. St. Rep. 703. 'In such cases the simple but comprehensive question is whether the circumstances are such that equitably the defendant should restore to the plaintiff what he has received.' Johnson v. Miller, 31 N.S. 83, 87."

Atlantic Coast Line R. Co. v. Florida (1934),
295 U.S. 301, 309-310.

The case lays down the rules that the burden is upon the party seeking restitution to show that it is inequitable to order him to restore it.

The action of the trial judge in holding, as he did deliberately, that the burden was upon the defendants to show that it was inequitable to compel them to restore, rather than that the burden was upon the United States to show that it was inequitable to allow them to retain the money, is not supportable by any case decided by the Supreme Court and only by a misconstruction of one or two Circuit Court decisions.

In *Woods v. McCord* (1949) (C.A. 9th), 175 F. (2d) 919 this Court held that the trial judge abused this discretion in failing to order restitution under the circumstances. The trial judge in that case apparently believed that he did not have power to order restitution of overpayments made to the defendants more than one year prior to the commencement of the action despite aggravated circumstances showing that defendants knowingly and wantonly overcharged their tenants as a matter of long-sustained business practice, and when their demeanor was suspected failed to cooperate with the housing expediter in any way to permit him to learn the facts.

“The trial court apparently felt that although the one year period did not apply to actions for restitution, and the doctrine of laches did not for obvious reasons apply to Government agencies in their efforts to enforce Congressional policy, nonetheless (since restitution was primarily for the benefit of the tenants) the doctrine of laches was

apposite, and that since the normal period of laches, as an equitable concept, was co-existent with cognate statutes of limitations, a one year equitable limitation should be applied to actions for restitution. With this we do not agree. It is merely an indirect application of that which cannot be done directly.”

Woods v. McCord (1949), (C.A. 9th), 175 F. (2d) 919, 921-922.

“Scrutiny of the numerous unanswered requests by the Office of Price Administration for information, from appellees, the necessity to subpoena appellees’ records in order to obtain that information, plus the necessity of the suit in the State court indicated absence of an honest effort to cooperate.”

Woods v. McCord (1949) (C.A. 9th), 175 F. (2d) 919, 922.

In the instant case, appellants admit that the judgment of restitution is within the jurisdictional power of the trial Court, and that the order for restitution is valid, provided that plaintiff sustain its burden of proving that equity—all of the circumstances involved in the case—demands such exercise of the Court’s discretion. His Honor, Judge Carter, assumed it was mandatory on him to order restitution whether the plaintiff sustained any burden of proof or not, and he so found, we submit, erroneously.

In *Woods v. Davis* (1950) (C.A. 9th), 185 F. (2d) 567, this Court had before it an extraordinary transcript. The trial judge was asked to render a sum-

mary judgment for plaintiff, after all allegations of the complaint were admitted by defendant by his failure to reply. Instead, the trial judge dismissed the suit on the ground that defendant was without means. This Court pointed out, in reversing the ruling, that the trial judge was in error not only because he attempted to make findings of fact without the formality of a trial, but also because lack of means is in and of itself no sufficient reason to deny restitution.

“* * * It necessarily follows that a claim of inability to refund excess rentals, unlawfully exacted of tenants, may not be considered in the trial or determination of a suit by the Expediter to obtain a restitution order. If the contrary view were to obtain landlords would be encouraged in advance to disregard the law and to dissipate or secrete their illicit profits.”

Woods v. Davis (1950), (C.A. 9th), 185 F. (2d) 567, 569.

It should be noted that in reversing, this Court did not order the trial Court to enter a judgment for restitution, but rather remanded the cause “for further proceedings not inconsistent with this opinion” (*Woods v. Davis* (1950) (C.A. 9th), 185 F. (2d) 567 at 569).

We respectfully submit that these cases do not manifest any intention on the part of this Court to disregard in rent cases the firmly established rules of restitution and burden of proof and to shift to the defendant the burden to prove to the Court’s satisfaction that restitution should not be ordered.

THE DAMAGES ORDERED PAID ARE EXCESSIVE.

Plaintiff's Exhibit A (Tr. 9) sets forth the overcharges on the basis of which the trial Court entered judgment. Thereby it appears that overcharges within one year preceding the filing of this action amounted to \$75, and the overcharges preceding this one year period totaled \$925; by its Amended Order for Judgment, the trial Court found that \$25 of the \$925 were legally collected, so that only \$900 were illegally collected by defendants prior to the one year period.

The judgment entered herein overlaps. It provides for \$225 damages, being three times the \$75 improperly collected within one year of the suit's commencement, and \$975 restitution to the tenant. Thus the total cost to defendants is \$900 restitution reflecting overcharges received prior to August 3, 1949 and four times the overcharges of \$75 received between August 3, 1949 and August 3, 1950.

Appellants contend that the Housing and Rent Act can be construed only to permit a maximum judgment of three times the overcharge.

In *Orenstein v. United States* (1951) (C.A. 1st), 191 F. (2d) 184 at 191-192, the Court states:

"But in §204 of the Housing and Rent Act of 1947, as amended, containing the provision for recovery of damages corresponding to § 205(e) of the Emergency Price Control Act, the United States is entitled as of right to judgment for three times the amount of the overcharges occurring within one year prior to the filing of the complaint, unless the landlord proves that the viola-

tion was neither willful nor negligent. No discretion as to the amount of damages is confided in the court. Therefore, if the United States insists, as it may, upon recovery of a judgment for treble damages in the case of a willful or negligent violator, the court must render such judgment; however, if the court does so, it will no longer be an appropriate exercise of equitable jurisdiction to issue an order for restitution to the tenant under § 206(b) of the Housing and Rent Act. We say this, because an order for restitution and the recovery by the United States of treble damages by way of penalty are both in vindication of the public interest, where the tenant fails to pursue his private remedy; and *there is no indication that Congress ever contemplated that the maximum liability of even a willful violator should be in excess of three times the amount of the overcharges.*” (Emphasis added.)

Orenstein v. United States (1951) (C.A. 1st),
191 F. (2d) 184, 191-192.

CONCLUSION.

Appellants respectfully submit that the trial Court improperly shifted the burden of proof upon defendants in regard to the equitable issue raised by plaintiff's demand for restitution.

As to the overcharges found to have been improperly paid within one year prior to the filing of this suit, the trial Court improperly ordered defendants to pay a total of four times the overcharges instead of the

maximum treble damages or double damages plus restitution.

Dated, Berkeley, California,
December 10, 1951.

Respectfully submitted,
FRANCIS T. CORNISH,
Attorney for Appellants.

No. 13088

**In the United States Court of Appeals
for the Ninth Circuit**

**DONALD MCKITTRICK AND BARBARA MCKITTRICK,
APPELLANTS**

v.

UNITED STATES OF AMERICA, APPELLEE

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

BRIEF FOR APPELLEE

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A. M. EDWARDS,

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CECIL H. LICHLITER,

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FILED

MAR 12 1952

PAUL P. O'BRIEN

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In the United States Court of Appeals for the Ninth Circuit

No. 13088

**DONALD MCKITTRICK AND BARBARA MCKITTRICK,
APPELLANTS**

v.

UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION*

BRIEF FOR APPELLEE

STATEMENT OF JURISDICTION

Appellants, defendants below, hereinafter referred to as defendants, appeal from a judgment entered May 11, 1951, by the United States District Court for the Northern District of California, Southern Division (Hon. Oliver J. Carter), in an action by the United States of America pursuant to Sections 205 (a) and 205 (c) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. App. 925 (a), 925 (c))¹ and Sections 205, 206 (b) and 206 (c) of the Housing and Rent Act of 1947, as amended (50 U. S. C. A. App. 1895, 1896 (b), 1896 (c)).² Such

¹ 50 U. S. C. A. App. Secs. 901 et seq., hereinafter referred to as the "Price Control Act," or "Act of 1942."

² 50 U. S. C. A. App. Secs. 1881 et seq., hereinafter referred to as the "Housing and Rent Act," or "Act of 1947."

judgment granted plaintiff an injunction, directed restitution by defendants of rent overcharges in the amount of \$975 pursuant to Section 205 (a) of the Act of 1942 and Section 206 (b) of the Act of 1947, together with the sum of \$225 as treble damages under Section 205 of the 1947 Act (R. 35-36). A motion for new trial filed May 21, 1951 (R. 37), was denied June 8, 1951 (R. 39), and on July 9, 1951, the defendants filed notice of appeal (R. 40). Jurisdiction of this Court is invoked pursuant to Section 1291 of the Judicial Code (28 U. S. C. 1291).

COUNTERSTATEMENT OF THE CASE

The appeal presents in effect but two questions—(1) whether the court below properly awarded restitution of the total rent overcharges found to have been received by defendants in violation of the 1942 and 1947 Acts (R. 33-34, 36), and (2) whether it was proper to also render judgment for treble the amount of overcharges received within one year prior to filing the complaint, which overcharges the trial court found as a fact to have been “willfully” demanded and collected (R. 32, 34, 36). As defendant’s Statement of Facts (Brief, pp. 2-4) omits any definite reference to the pleadings and the findings and conclusions of the trial court, the following résumé of proceedings in the court below will be stated:

The complaint filed August 3, 1950, charged the defendants with violation of the Price Control and Housing and Rent Acts and Regulations issued there-

under³ by collecting rents in excess of the legal maximum for certain controlled housing accommodations identified as 111 Oakmont Avenue, Piedmont, California, within the Alameda County Defense-Rental Area (R. 1-9). A schedule attached to the complaint named Bruce A. Wilson as the tenant alleged to have been overcharged, the rental accommodations occupied by him, the period of tenancy, the amount of rents collected, the legal maximum rent of \$110 per month and the amounts of overcharges (R. 9). Such overcharges were alleged as a \$300 "cash bonus paid in advance" to defendants on or about July 13, 1946, as a condition to rental of the accommodations for one year, and a monthly rental thereafter of \$135 from July 14, 1947, to November 13, 1949 (R. 9). Such payments represented an overcharge over the stated period of \$25 in excess of the lawful maximum monthly rent of \$110 (R. 9). The complaint prayed injunction against further violations of the Housing and Rent Act, restitution of all overcharges unlawfully collected and judgment under Section 205 of the 1947 Act for three times the overcharges received within one year immediately preceding institution of the suit (R. 8).

Defendants by their answer admitted being landlords of and having rented the accommodations referred to in the complaint, but denied violation of either the Price Control or Housing and Rent Acts

³ Rent Regulation for Housing (10 F. R. 13528) and Controlled Housing Rent Regulation (12 F. R. 4331 and 14 F. R. 1571).

(R. 10, 12). Defendants did not deny the alleged maximum legal rent of \$110 per month for the accommodations. The answer asserted in substance as matters of defense that no action existed under the 1942 Act after July 1, 1947, when the 1947 Act became effective, that no cause of action existed for any alleged overcharges received prior to one year before institution of suit on August 3, 1950, and that Section 205 of the 1947 Act, as amended, was not retroactive to permit any action for alleged violations thereof prior to the effective date of amendment on April 1, 1949 (R. 10, 11, 13). The answer further claimed that between the months of July 1946 and November 1949, the tenant, Wilson, had damaged the rented premises and furniture and fixtures therein in excess of the amount sought to be recovered by plaintiff and because of this alleged offset any cause of action for treble damages as set forth in count III of the complaint (R. 6) was "paid and discharged" (R. 14).

In response to Request for Admissions served by plaintiff under Federal Procedural Rule 36 (R. 16), defendants admitted that for the period alleged in the complaint (R. 9), the tenant Wilson was in possession of the accommodations involved and that no action had been brought by the tenant against defendants to recover the overcharges alleged (R. 17, 18). In answer to interrogatories also served by plaintiff pursuant to Federal Procedural Rule 33, defendants stated in substance the following facts: On or about July 13, 1946, the defendants rented the Oakmont Avenue premises to Bruce A. Wilson and his wife,

Beatrice Wilson, by written "Lease" a copy of which was attached to their answers (R. 22, 27). The term thereby provided was for one year, from July 13, 1946, to July 13, 1947, at the total rent of \$1,320, payable monthly (R. 28). At the time said lease was executed, defendants in addition to the Oakmont Avenue premises, owned a home in Walnut Creek, California, which "was not subject to rental control" (R. 23). For such Walnut Creek property defendants had been offered a rental of \$150 per month, which they had determined to accept, and live in the Oakmont Avenue property (R. 23).

"Under these circumstances" and "to induce" defendants "to forego their right to occupy" the Oakmont Avenue home for one year, and "to occupy and not to rent their home in Walnut Creek, and to permit" the Wilsons "to enter into possession" of the Oakmont Avenue property "but not as rent" for said premises, the Wilsons "paid defendants the sum of \$300" (R. 23). Upon expiration of the lease July 13, 1947, the same was renewed by written endorsement thereon for an additional one-year period to July 13, 1948 (R. 22). Such renewal agreement was signed by defendants, Donald McKittrick and Barbara McKittrick, and by the tenants, Bruce Wilson and his wife, Beatrice Wilson (R. 22). For the period from July 13, 1947, to July 13, 1948, the Wilsons paid to defendants \$110 per month rent and the sum of \$300 at the rate of \$25 per month as an inducement to defendants "to forego possession of their own house for another year" and to continue occupancy of their

Walnut Creek home and not rent it for that period (R. 24-25).

On or about July 13, 1948, defendants and the Wilsons orally agreed to continue the same rental agreement for "an additional period" to July 13, 1949 (R. 22, 25). On or about July 13, 1949, by oral agreement of the same parties the stated rental arrangement was continued until other housing accommodations then being prepared for the Wilsons could be completed and ready for occupancy (R. 22-23, 25-26). Under such agreement the Wilsons "would pay defendants' rent at the rate of \$110 per month and an additional sum of \$25 for foregoing defendants' right of occupancy" of the Oakmont Avenue premises (R. 26). All of which sums were paid as agreed (R. 26).

Proceedings Upon Trial and Findings of Fact and Conclusions of Law by the Trial Court

The case came to trial December 28, 1950 (R. 45). Following a statement by the attorney for plaintiff (R. 45-48), defendants' counsel in addressing the court (R. 49) stated that the "only question" involved was "the equitable defense against restitution" (R. 54). The same counsel further observed as to the "three months overcharge" of \$75, that there were presented in effect the further questions—"first," whether or not such sum "should be trebled," and "secondly," whether anything was due by reason of the defendants' claim that the tenants had "damaged the landlord" and were indebted to the landlord "in excess of any overcharge in the rent" (R. 54).

Plaintiff produced as witnesses the Rent Attorney of the Alameda County Defense-Rental Area, Cyril M. Saroyan (R. 59), and the tenants, Bruce A. Wilson (R. 87, 255) and his wife, Beatrice Wilson (R. 124, 219). For the defendants both Donald McKittrick (R. 140), and his wife, Barbara McKittrick (R. 177) testified. After considering this testimony and exhibits produced in evidence by the respective parties the trial court by Findings of Fact determined (R. 30):

The housing accommodations were originally registered by the defendant, Barbara McKittrick, on December 6, 1944, at the monthly rental of \$150 which was reduced to \$110 per month by order of the Area Rent Director issued April 3, 1945 (Finding of Fact 2, R. 31).

On or about July 13, 1946, defendants leased the accommodations to Bruce A. Wilson for one year at a total rent of \$1,320, and as a condition thereof, "although not mentioned in the lease," required the tenant to pay an additional \$300 in cash representing an excess of \$25 per month over the maximum prescribed rent (Findings 3 and 4, R. 31-32).

Upon expiration of said lease in July 1947, and continuing to about November 13, 1949, the defendants demanded and received from the tenant monthly rentals of \$135 for the accommodations, which totaled \$700 in excess of the prescribed rent of \$110 per month over the stated period (Finding of Fact 5, R. 32).

Following the tenant's discovery of the prescribed rent later in November 1949 he made written request

upon defendants for restitution of the total overcharges which the defendants failed to make either in whole or in part, and no action has been instituted by the tenant on account of such overcharges (Findings 6 and 7, R. 32).

Three of the monthly overcharges of \$25 each for which damages were sought occurred within one year of the filing of the complaint and such three overcharges were "willfully demanded, accepted, and received" by the defendants within the same period (Findings 8 and 9, R. 32).

Between July 13, 1946, and November 13, 1949, the tenants did not willfully and wantonly damage the premises nor the furniture and furnishings of the accommodations involved in the amount of \$1,225, or any sum whatever (Finding of Fact 10, R. 32-33).

Among other conclusions of law the court below determined (R. 33):

1. * * *.
2. * * *.

Under the Acts and Regulations involved the maximum legal rent for the accommodations at all times other than from July 13, 1946, to July 25, 1946, was \$110 per month and the defendants by demanding and receiving the overcharges specified in the foregoing Findings of Fact, "did knowingly violate the Acts and Regulations" (Conclusions 3 and 4, R. 33).

The defendants had failed to satisfactorily show why the equitable power of the court should not be exercised, or to satisfactorily assume the burden of proving that acceptance of the overcharges within the year immediately preceding the filing of the com-

plaint was not willful nor the result of failure to take practicable precautions against such occurrence (Conclusion of Law 5, R. 33).

The plaintiff on account of said violations was therefore entitled to recover treble damages from the defendants in the total amount of \$225 (three times the total overcharges of \$75 received within one year prior to institution of the action), and to an injunction against further violations by the defendants as prayed in the complaint (Conclusions 6 and 7, R. 34).

Plaintiff is entitled to a judgment directing the defendants to refund to the plaintiff on behalf of the tenant Wilson, or in the alternative to plaintiff on its own behalf, in the event the said tenant cannot be located, the aforesaid overcharges in the total amount of \$975 (Conclusion of Law 8, R. 34).

The defendants were entitled to take nothing by reason of their claim of setoff for damages (Conclusion of Law 9, R. 34).

Upon the foregoing findings and conclusions the court below on May 11, 1951, entered final judgment which in effect ordered and decreed (1) that the defendants be enjoined from demanding or receiving rents in excess of the lawful maximum established pursuant to the Act of 1947; (2) that the defendants make restitution to plaintiff on behalf of the tenant Wilson for overcharges in the sum of \$975; and (3) that the plaintiff recover from defendants the sum of \$225 "as treble damages for the wilful violations" of the Act and Regulations by reason of the overcharges involved (R. 35-36). On May 21, 1951, de-

defendants' motion for a new trial was denied (R. 37, 39) and on July 9, 1951, the defendants from the said judgment entered their appeal (R. 40).

ARGUMENT

I

**The record presents no basis for reversal of the judgment
appealed from**

The brief for defendant asserts only two alleged errors by the court below to the following effect (pp. 6-7):

1. The trial court erred in finding that it was incumbent upon defendants to prove that they should not restore the rental overcharges, instead of requiring plaintiff to prove "that the equities demanded that money paid by a mere volunteer (from the legal standpoint) should be restored to him" (p. 6).

2. That "portion of the judgment" was erroneous which ordered defendants to pay in effect a total of four times the overcharges collected over the three months' period within a year prior to institution of the action (pp. 6-7).

It is submitted that both of the foregoing contentions are clearly without merit.

**1. Contrary to the contention of defendants, restitution was properly
awarded for the entire rental overcharges**

Defendants by the first alleged error (Brief, p. 4) misconstrue entirely the trial court's conclusion of law No. 5 as relating to the exercise of equitable jurisdiction (R. 33). Contrary to the contention urged, the lower court did not find that it was incumbent

upon defendants to prove that they should not make restitution of the \$300 bonus and the additional monthly overcharges of “\$25 more than the ceiling rental” which the Brief (p. 6), admits were collected. With respect to burden of proof, the trial court held only in effect that defendants had not shown that such admitted overcharges were not willful nor the result of failure to take practicable precautions against their occurrence (R. 33). This burden was expressly imposed upon defendants by Sections 205 (e) of the 1942 Act and 205 of the Act of 1947 (*Infra*, p. 16). As will be hereafter shown (*Infra*, p. 16), such action for treble damages is entirely separate and distinct from the equitable right of restitution provided by Sections 205 (a) of the Act of 1942 and 206 (b) of the 1947 Act.

The principle is clearly established by the decisions of this Court and of other appellate jurisdictions that the award of restitution is primarily in the public interest and to enforce compliance with the Acts of Congress to prevent inflation. *Woods v. McCord*, 175 F. 2d 919 (C. A. 9); *Woods v. Davis*, 185 F. 2d 567 (C. A. 9); *Woods v. Richman*, 174 F. 2d 614, 615 (C. A. 9); *Ebeling v. Woods*, 175 F. 2d 242, 245 (C. A. 8); *Woods v. Bomboy*, 179 F. 2d 565, 566 (C. A. 3); *Creedon v. Randolph*, 165 F. 2d 918 (C. A. 5). As this Court observed in *Woods v. McCord*, *supra*, “the action for restitution is not solely for the redress of private wrongs,” but “is primarily concerned with the vindication of public rights” (at p. 922). And in the more recent decision of *Woods v. Davis*, *supra*, where such relief was sought in an action under both the Price Control and

Housing and Rent Acts, the Court said (185 F. 2d, p. 569):

“The authority of the courts, under § 205 (a) of the 1942 Act and § 206 (b) of the Act of 1947, to order restitution of excess rentals is settled by *Porter v. Warner Holding Co.*, 328 U. S. 395, 66 S. Ct. 1086, 90 L. Ed. 1332, and by later decisions in this and other circuits. Consult *Woods v. Richman*, 9 Cir., 174 F. 2d 614. The object of employing this equitable remedy is to check inflationary trends and to effectuate generally the policy of Congress. * * *

The law is no respecter of persons, and we think the best way to educate those contemplating evasion of it is to demonstrate that violation will in every case result in judgment against the wrongdoer. * * *

It follows that there is no merit to the contention of defendants (Brief, p. 5), that the court below “failed to find as to the equities concerning restitution.”

Equally untenable is the further argument (Brief, p. 6) that the trial court “could have found” from the evidence that Wilson, the tenant, “induced McKittrick to enter into the tenancy” and “voluntarily paid” the overcharge of \$25 per month to induce defendants not to take possession of the Oakmont Avenue premises.⁴ The rule is clearly established that

⁴ Factual statements at p. 3 of Defendant’s Brief are controverted in the testimony. The tenant Wilson testified that he did not offer to pay \$135 monthly rental for the premises and did not offer to give the defendants \$300 in advance (R. 226) as stated by the defendant McKittrick (R. 151). The same witness fur-

the voluntary payment of price or rental overcharges constitutes no defense to an action for violation of the 1942 or 1947 Acts. *Porter v. Crawford & Doherty Foundry Co.*, 154 F. 2d 431, 434 (C. A. 9); *United States v. Grubl*, 186 F. 2d 470 (C. A. 9); *Bray v. Peck*, 190 F. 2d 998 (C. A. 9); *Ebeling v. Woods*, 175 F. 2d 242, 245 (C. A. 8).

In *Porter v. Crawford & Doherty Foundry Co.*, *supra*, which was an action by the Price Administrator for injunction and treble damages under Sections 205 (a) and 205 (e) of the former Price Control Act, this Court held that Congress intended the imposition of statutory damages on the price violator "as a deterrent to the violator" even though the buyer by making the purchase "may have aided the seller in violating the law" (154 F. 2d, p. 434). In *Ebeling v. Woods*, *supra*, the defendant appealed from a judgment which ordered restitution to the tenant of a rental overcharge collected by the landlord as a "bonus" in violation of the 1942 Act. In answer to the contention that restitution should be denied for the reason that "it was as wrong for the tenant to pay the \$500 bonus as it was for the landlord to accept it," the Court said (175 F. 2d, p. 245):

"Under § 50 U. S. C. A. Appendix, § 904 (a), the duty to avoid overcharges under the Act is the responsibility of the landlord and not the tenant. The landlord alone, because of his superior position generally in the housing-

ther testified that he gave the check for the stated amount because "I was asked for it," and upon certain representations by the defendants as to approval by O. P. A. of an advance in rental which he believed (R. 227, 229).

shortage situation was made the offender under the Act. Congress regarded a tenant, who paid more than the authorized rental for a housing accommodation, as having committed no wrong. Cf. *Zwang & Bowles v. A. & P. Food Stores*, 181 Misc. 375, 46 N. Y. S. 2d 747. Whether the excess rent was willingly or unwillingly paid, the statute prohibited the landlord from accepting it and provided for its recovery from him.”

In *United States v. Grubl, supra*, this Court gave effect to the same principle in considering an action under both the 1942 and 1947 Acts for rental overcharges and praying the same relief of injunction, restitution and statutory damages as in the case at bar. The defendant there sought to assert substantially the same defense as urged in the present appeal—that the “excess amounts” of rent collected by the landlord “were paid to him pursuant to an independent contract with his renters and not as rent” (186 F. 2d, p. 471). It was further contended that the tenants had given to the landlord a “full and complete release” for any overcharge claim (at p. 472). This Court held that such “voluntary agreement” was “not a valid defense” to the action, but was “contrary to the express provisions” of both the 1942 and 1947 Acts and the Rent Regulations applicable.⁵ The Court further observed (at pp. 472–473) that “Where a statutory proscription is

⁵ The Court here referred to Section 4 (a) of the 1942 Act, Section 206 (a) of the Act of 1947, and Rent Regulations for Rooming Houses issued pursuant to the 1947 Act (12 F. R. 4302; 13 F. R. 1873).

placed upon one party he may not plead the collusion of a third party for violation of the statutory edict.” (Citing *Popplewell v. Stevenson*, 176 F. 2d 362 (C. A. 10); *National Labor Relations Board v. American Potash & Chemical Corp.*, 118 F. 2d 630, 631 (C. A. 9); *Ebeling v. Woods*, *supra*; and *Porter v. Crawford & Doherty Foundry Co.*, *supra*.)

2. The record presents no equities in favor of defendants upon the basis of which the trial court should have denied restitution for the rental overcharges admittedly collected

The defendants (Brief, p. 14) “admit that the judgment of restitution is within the jurisdictional power” of the court below and the restitution order “is valid,” provided that plaintiff sustained the burden of proving that equity under all the circumstances of the case demanded the exercise of the court’s discretion. Defendants further contend that the trial court erroneously assumed it was mandatory to order restitution whether the plaintiff sustained such burden. There is no basis to support this contention and the defendants point out no equitable aspects upon which the award of restitution should be denied.

In contending that the burden of proof was upon the United States, defendants (Brief, pp. 7-9) cite Section 205 of the Housing and Rent Act and assert that any action for recovery of overcharges paid before August 3, 1949, or one year prior to commencement of the action on August 3, 1950, “is barred.” Such contention is entirely misplaced and is clearly without supporting basis. In *Woods v. Richman*, 174 F. 2d, pp. 615-616, and *Woods v. McCord*, 175

F. 2d, pp. 921-922, *supra*, this Court gave effect to the established principle that the limitation of one year in which to sue for the treble damages there provided has no application to the separate and distinct equitable relief of restitution under Section 205 (a) of the 1942 Act and Section 206 (b) of the Act of 1947. See too, *Woods v. Gochmour*, 177 F. 2d 964 (C. A. 9); *Brooks v. Woods*, 181 F. 2d 716 (C. A. 9); *Ebeling v. Woods*, *supra* (175 F. 2d at p. 244); *Woods v. Wayne*, 177 F. 2d 559, 560 (C. A. 4); *Warner Holding Co. v. Creedon*, 166 F. 2d 119 (C. A. 8), after remand by the Supreme Court in *Porter v. Warner Holding Co.*, 328 U. S. 395.

Aside from Section 205 of the 1947 Act having no application to the award of restitution, the burden was upon defendants under such section as well as Section 205 (e) of the 1942 Act both to plead and prove freedom from willfulness, as well as the taking of practicable precautions to avoid the occurrence of violations, as a defense to liability in treble damages for the admitted overcharges (*Bowles v. Glick Bros. Lumber Co.*, 146 F. 2d 566, 571-572 (C. A. 9); *Fontes v. Porter*, 156 F. 2d 956, 958 (C. A. 9); *Bowles v. Franceschini*, 145 F. 2d 501, 514 (C. A. 1); *McRae v. Creedon*, 162 F. 2d 989, 992 (C. A. 10). See too, as applying the stated rule in actions for statutory damages under the 1947 Act, *Small v. Schultz*, 173 F. 2d 940, 943 (C. A. 7); *Woods v. Piolet*, 187 F. 2d 453 (C. A. 7); *Beatty v. United States*, 191 F. 2d 317, 319 (C. A. 8).

The defendants in their answer (R. 10-14) did not plead either freedom from willfulness or the tak-

ing of practicable precautions to avoid the overcharges. At trial in the court below such overcharges were in effect admitted (R. 54), and the same clearly appeared from defendants' answers to plaintiffs' interrogatories (R. 23-26, *supra* pp. 4-6).

The trial court by findings of fact determined (R. 32) that the three monthly overcharges of \$25 each within one year of filing the complaint on August 3, 1950 (R. 9), were "willfully" demanded and collected, and as a conclusion of law the court held (R. 33) that by demanding and receiving the earlier overcharges as specified in the factual findings (R. 31-32), the defendants "did knowingly violate the Acts and regulations."

The defendants do not question the foregoing finding of willfulness and the receipt of the overcharges set forth in the complaint is admitted (Brief, p. 5). Contrary to the contention of defendants (Brief, p. 14), the trial court did not assume that it was "mandatory on him" to order restitution, but expressly recognized that to the award of such relief "equitable defenses" might be interposed (R. 55-56). Upon the claim of defendants that the tenants damaged the rented premises and furnishings thereof during their occupancy (R. 14), the trial court found as a fact that such damage did not occur in "any sum whatsoever" (R. 33). This factual finding the defendants likewise do not challenge. It follows that there is no basis to contend that by the award of restitution the discretion of the trial court was abused.

3. Contrary to the contention of defendants, the trial court did not err in rendering judgment for treble damages in addition to the award of restitution

By findings of fact which are not questioned, the trial court determined that defendants collected the following rental overcharges:

The cash sum of \$300 on or about July 13, 1946, which was an excess of \$25 per month for one year over the maximum legal rent of \$110 per month (Finding of Fact 4, R. 31-32).

Monthly rentals of \$135 per month from July 13, 1947, to November 13, 1949, representing overcharges of \$25 for 28 months and amounting to \$700 (Finding of Fact 5, R. 32).

The total of the foregoing overcharges is \$1,000.

The trial court further found that three of the monthly overcharges occurred within the one year period between August 3, 1949, and August 3, 1950, when the complaint was filed (R. 9); also that such overcharges totaling \$75 were "willfully" demanded and received (Findings of Fact 8 and 9, R. 32).

The judgment of the trial court awarded restitution in the amount of \$975⁶ and treble damages of \$225

⁶ Nine hundred and seventy-five dollars represented the total overcharges of \$1,000 diminished by \$25 of the \$300 paid to the defendants by the tenant upon execution of the lease July 13, 1946 (R. 92). An amended order for judgment entered April 25, 1951, noted that the Price Control Act of 1942 as extended did not become effective until July 25, 1946, and that the \$25 payment for the first month of the lease should be deducted from the balance of the \$300 payment to be restored. This order though designated by defendants in the appeal record (R. 43), and included in the documents transmitted to this Court (R. 238), does not appear in the printed record, and is set forth in Appendix of the present brief (*infra*, p. 29).

for the overcharges “wilfully” collected during the stated one-year period (R. 36).

Contrary to the contention of defendants (Brief, p. 16), there was no error in such judgment for statutory damages in addition to the award of restitution. In *Woods v. Witzke*, 174 F. 2d 855 (C. A. 6), it was held in an action under the former Price Control Act that judgment for “treble damages” covering excess rentals “collected within the year preceding the filing of the complaint” should be granted in addition to restitution of the total overcharges, the Court observing that the two remedies are entirely separate and are not irreconcilable and “that there is no incongruity between the award of statutory damages and restitution” (at p. 857).

The *Witzke* decision was recently followed and applied by the Court of Appeals for the Eighth Circuit in *United States v. Ziomek*, 191 F. 2d 818 (C. A. 8), respecting the recovery of treble damages in addition to the award of restitution. In the *Ziomek* case an action was brought under Sections 205 and 206 (b) of the 1947 Act, and the same relief of damages, restitution and injunction was prayed as in the case now before the Court. The trial court in granting only injunctive relief and restitution and denying statutory damages, there held that under the Housing and Rent Act a judgment for statutory damages could not be entered simultaneously with the award of restitution and an injunction because they were incompatible remedies (191 F. 2d at p. 820). In reversing such judgment the reviewing court (at p. 821) gave effect to the established principle that the

equitable relief of restitution under Section 206 (b) of the Act, “is consistent with and differs greatly from the damages” which may be awarded under Section 205 (citing *Porter v. Warner Holding Co.*, *supra*, 328 U. S. at p. 402). The Court further observed (p. 821) that while the granting of restitution rested “wholly in the equitable discretion of the Court,” that an award of damages “is not discretionary but is required by the terms of the statute” (citing among many other decisions, the decision of this Court in *Mattox v. United States*, 187 F. 2d 406 (C. A. 9), cert. denied, 72 S. C. 37). Respecting judgment for multiple damages in addition to restitution the Court said (191 F. 2d at p. 821):

The award of treble damages in a willful case will not deprive the court of its discretion to grant restitution unless the amount awarded would under all the circumstances constitute an abuse of discretion.

The reasoning of the decisions by the Sixth and Eighth Circuit Courts of Appeals in the *Witzke* and *Ziomek* cases is consistent with the reasoning of this Court in *Mattox v. United States*, *supra*, to the extent that this Court also recognized that “Restitution is an equitable remedy resorted to under Sec. 206 (b) [of the 1947 Act] independently of the award of damages” (at p. 408). True this Court in the *Mattox* case had no occasion to reach the precise problem presented here because the trial court had found (at p. 409) that the defendants’ conduct there was free from willfulness and that practicable precautions had been taken, and this Court felt that the finding

of the court below in this regard found support in the record.

In the judgment now being considered, the court below as a finding of fact determined that the total overcharges of \$75 occurring within the one year prior to filing the complaint were “wilfully” demanded and collected (R. 32), and this finding is not challenged here. It was therefore mandatory under Section 205 of the 1947 Act to award damages in treble the stated amount of overcharges not barred by the statute of limitations, or \$225 as the trial court did (R. 36). The court below in exercise of sound discretion also awarded restitution for the total overcharges of \$975 (R. 36). In no respect have the defendants established that by such determination the discretion of the trial court was so manifestly abused that it should be disturbed (*Bowles v. Huff*, 146 F. 2d 428 (C. A. 9)). If anything, it would appear from the facts present in this case, *supra*, page 5, that the lower court acted well within the equitable discretion in awarding restitution in addition to statutory damages. It follows that there was no error in the award of both treble damages and restitution.

Contrary to appellants' contention (Brief, p. 16), *Orenstein v. United States*, 191 F. 2d 184, 191, is not a square authority opposed to the decisions reached by the Court of Appeals for the Sixth and Eighth Circuits. True, by way of dicta the First Circuit Court of Appeals adopted a different view respecting the award of both restitution and treble damages from the determination of the Sixth and Eighth Circuits in the *Witzke* and *Ziomek* decisions when it

declared that Congress intended the limit of liability to be no more than treble the amount of the established overcharges. But as observed in the *Orenstein* case (p. 188), the trial court there did not determine that the rental overcharges were willful, and unlike the complaint in the case now being considered (R. 8), the prayer for relief in the *Orenstein* case expressly stated that in the event restitution be awarded, that the judgment for damages "be reduced by the amount of such restitution" (at p. 192). Since restitution in the *Orenstein* case exceeded the single damages recoverable under the facts of the case, by the very terms of the prayer of the complaint in that case, no statutory damages whatever could be awarded. In the case at bar the prayers are different in that it is expressly prayed that judgment be awarded for both restitution and treble damages for overcharges received within one year of the commencement of the action (R. 7-8). Also, in the case at bar, the trial court found that the overcharges within the one year before institution of the action were "wilful" (R. 32). Consistent with the prevailing law, the proof in the case and the prayers of the complaint, the court awarded treble damages, as being mandatory under the express provisions of the 1947 Act (*infra*, p. 26), and restitution as an exercise of discretion. It is submitted that the principles as determined in the *Witzke* and *Ziomek* cases fully sustain the judgment rendered.⁷

⁷ As amended in 1951, the Housing and Rent Act provides the same limited discretion in granting statutory damages which courts were authorized to exercise under Section 205 (e) of the

CONCLUSION

The judgment appealed from presents no error and should be affirmed.

All of which is respectfully submitted.

ED. DUPREE,

General Counsel,

A. M. EDWARDS,

Assistant General Counsel,

CECIL H. LICHLITER,

Special Litigation Attorney,

Office of Rent Stabilization,

Washington 25, D. C.

1942 Act (*infra*, p. 24). In a willful case, the court may now award more than single and up to treble the overcharge; and it will no longer be mandatory to award treble the overcharge. In the willful case the court may also award double statutory damages to the Government where it has awarded restitution to tenants as was done and approved in *Cobleigh v. Woods*, 172 F. 2d 167 (C. A. 1), which considered Section 205 (e) of the 1942 Act. It is doubtful whether this amendment will apply to violations occurring prior to the date of the amended Act because the prior Act created *substantive* rights which may not be affected retroactively, particularly by an amendment to the statute which is not expressly retroactive by its terms. (See p. 28 Appendix, for amendment.)

APPENDIX

EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED—50 U. S. C. A. APP. 925 (A) AND 925 (E).

“SEC. 205 (a). Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.”

“SEC. 205 (e). If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine:

Provided, however, That such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.

For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. * * *

APPENDIX

HOUSING AND RENT ACT OF 1947, AS AMENDED—50 U. S. C. A. APP. II AND III, SEC. 1895 AND 96 (B)

“SEC. 206 (b). Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.”

“SEC. 205. Any person who demands, accepts, or receives any payment of rent in excess of the maximum rent prescribed under section 204 shall be liable to the person from whom he demands, accepts, or receives such payment (or shall be liable to the United States as hereinafter provided), for reasonable attorney’s fees and costs as determined by the court, plus liquidated damages in the amounts of (1) \$50, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceed the maximum rent which could lawfully be demanded, accepted, or received, whichever in either case may be the greater amount; *Provided*, That the amount of such liquidated damages shall be the amount of the

overcharge or overcharges if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. Suit to recover such amount may be brought in any Federal, State, or Territorial court of competent jurisdiction within one year after the date of such violation: *Provided*, That if the person from whom such payment is demanded, accepted, or received either fails to institute an action under this section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the United States may institute such action within such one-year period. If such action is instituted, the person from whom such payment is demanded, accepted, or received shall thereafter be barred from bringing an action for the same violation or violations. For the purpose of determining the amount of liquidated damages to be awarded to the plaintiff in an action brought under this section, all violations alleged in such action which were committed by the defendant with respect to the plaintiff prior to the bringing of action shall be deemed to constitute one violation, and the amount demanded, accepted, or received in connection with such one violation shall be deemed to be the aggregate amount demanded, accepted, or received in connection with all violations. A judgment in an action under this section shall be a bar to a recovery under this section in any other action against the same defendant on account of any violation with respect to the same person prior to the institution of the action in which such judgment was rendered."

APPENDIX

Section 205, Housing and Rent Act of 1947, as amended in 1951 (Pub. L. 96, 82d Cong., 1st Sess. (1951)):

“SEC. 205. (a) Any person who demands, accepts, receives, or retains any payment of rent in excess of the maximum rent prescribed under the provisions of this Act, or any regulation, order, or requirement thereunder, shall be liable to the person from whom such payment is demanded, accepted, received, or retained (or shall be liable to the United States as hereinafter provided) for reasonable attorney’s fees and costs as determined by the court, plus liquidated damages in the amounts of (1) \$50, or (2) not more than three times the amount by which the payment or payments demanded, accepted, received or retained exceed the maximum rent which could lawfully be demanded, accepted, received, or retained, as the court in its discretion may determine, whichever in either case may be the greater amount: *Provided*, That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.”

APPENDIX

“Original Filed Apr. 26, 1951, Clerk, U. S. Dist. Ct.,
San Francisco”

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALI- FORNIA, SOUTHERN DIVISION

No. 29940

UNITED STATES OF AMERICA, PLAINTIFF

v.

DONALD MCKITTRICK AND BARBARA MCKITTRICK,
DEFENDANTS

Amended Order for Judgment

ORDERED:

That the Order for Judgment in the above-entitled action heretofore made and entered on the 12th day of February 1951 be amended and modified as follows:

Upon findings of fact and conclusions of law, judgment will enter against the defendants for restitution to tenant Bruce A. Wilson of overcharges in rent totaling \$975, and in favor of the plaintiff and against the defendants in the sum of \$225 damages, and for an injunction in accordance with paragraph 1 of the prayer of the complaint on file herein, and that plaintiff recover its cost of suit herein.

It appears from the evidence that the tenant, Bruce A. Wilson, paid to the defendants the sum of \$300 on the 11th day of July 1946 with the intention that

said sum of \$300 should be an advance payment of \$25 per month for one year on account of the rent to be paid for the premises involved in this action. It further appears that this payment was made at the time when there were no rent-control laws in effect. The Price Control Extension Act (50 U. S. C. A., App. 901a note) became effective on July 25, 1946, and the Emergency Price Control Act expired on June 30, 1946. It is therefore the opinion of this Court that the \$25 monthly payment for the first month of the lease, which commenced on July 13, 1946, was not in violation of any rent-control law or regulation, but it is the opinion of this Court that the balance of the \$300, which by the parties was intended to apply on each month's rent at the rate of \$25 per month, must be restored to the tenant as having been demanded, accepted, and received in violation of the policy of the law.

Judgment will be entered accordingly.

Dated: April 25, 1951.

OLIVER J. CARTER,
United States District Judge.

No. 13,088

IN THE

United States Court of Appeals
For the Ninth Circuit

DONALD McKITTRICK and BARBARA
McKITTRICK,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

FRANCIS T. CORNISH,
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Attorney for Appellants.

FILED

MAR 26 1952

PAUL P. O'BRIEN

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No. 13,088

IN THE

**United States Court of Appeals
For the Ninth Circuit**

DONALD MCKITTRICK and BARBARA
MCKITTRICK,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

In our opening brief we clearly pointed out two errors, and two errors only, which the District Court committed. These were:

1. The District Court improperly placed on appellants the burden of proving restitution should not be granted and decided against them, not because the United States established that restitution *should* be ordered, but because appellants failed to establish that restitution *should not* be granted, and,

2. In awarding a judgment for treble damages for the last three months of overcharges and ordering restitution of the same amount the District Court in effect required appellants to pay four times the over-

charge, whereas Congress has provided the maximum civil penalty to be three times the overcharge.

THE AUTHORITIES CITED BY APPELLEE DO NOT SUSTAIN THEIR POSITION THAT THE BURDEN WAS UPON APPELLANTS TO ESTABLISH RESTITUTION SHOULD NOT BE ORDERED.

As we read appellee's brief, these two points are answered only with confusion. A reference to the decisions from this Circuit cited by appellee in its brief can quickly clarify this confusion.

Fontes v. Porter (1946) (C.C.A. 9th), 156 F. (2d) 956 is cited (Appellee's Brief p. 16) for the proposition that the burden was upon appellants to establish that restitution should not be ordered. That was an appeal from a judgment awarding damages. Restitution was not involved. This Court there said:

"Good faith, however, is not a defense *to an action for damages*. Lack of willfulness, coupled with the taking of practicable precautions against occurrence of a violation, *operates only to reduce damages* to the amount of the overcharge." (Italics ours for emphasis.)

Fontes v. Porter (1946) (C.C.A. 9th), 156 F. (2d) 956, 958.

Again in *Mattox v. United States* (1951) (C.A. 9th), 187 F. (2d) 406 reversed a judgment denying damages where there were overcharges, and holds that a judgment *for damages* is mandatory. More is said of this decision later.

Porter v. Crawford & Doherty Foundry Co. (1946) (C.C.A. 9th), 154 F. (2d) 431, is cited (Appellee's Brief pp. 13, 15) for the proposition that equitable relief is mandatory. The judgment of dismissal in so far as it denied an injunction (restitution was not involved) was reversed because the District Court had erroneously decided that certain consent of the administrator was necessary (see 154 F. (2d) 431, 435). And in discussing the *damages* phase (not restitution) this Court pointed out that collusion of the purchaser, or the fact he was not injured or damaged, does not bar the right of the United States to damages.

United States v. Gruble (1951) (C.A. 9th), 186 F. (2d) 470 is cited (Appellee's Brief pp. 13, 14) that even a voluntary side agreement or release from the tenant is no defense to an action for restitution. In that case, restitution was not considered. This Court there said:

"Where a *statutory proscription* is placed upon one party he may not plead the collusion of a third party *in justification for violation of the statutory edict*.

"We agree with appellant that under the undisputed facts shown by the brief record before us *it was incumbent upon the court to grant judgment for an amount no less than the single amount of overcharge.*" (Italics ours for emphasis.)

United States v. Gruble (1951) (C.A. 9th), 186 F. (2d) 470, 472, 473.

Appellee cites *Bray v. Peck* (1951) (C.A. 9th), 190 F. (2d) 998 for the proposition that the voluntary

payment of the rent by the tenant was no defense to an action seeking restitution (Appellee's Brief p. 13). That action was not brought by the United States, and did not involve restitution. It was an action at law brought by the tenant for three times the overcharges and attorney fees. That case does not hold that the burden of proof in an equitable action for restitution is on the defendant. The Court held in an action for damages:

“* * * the burden of proof is upon that party which seeks to prove the premises are decontrolled.”

Bray v. Peck (1951) (C.A. 9th), 190 F. (2d) 998, 1002.

Appellee cites *Woods v. McCord* (1949) (C.A. 9th), 175 F. (2d) 919 for the propositions that restitution is primarily concerned with the public rights (Appellee's Brief p. 11) and that the one year limitation statute is not applicable to a suit for restitution (Appellee's Brief p. 15). In speaking of injunctive relief (not restitution) this Court said:

“The standard of public interest is the primary measure of the propriety and need for *injunctive relief* in these cases. *Hecht Co. v. Bowles*, 1944, 321 U.S. 321, 329, 64 S. Ct. 587, 88 L. Ed. 754”. (Italics ours for emphasis.)

Woods v. McCord (1949) (C.A. 9th), 175 F. (2d) 919, 922.

This Court there reversed a judgment which denied said:

“* * * it is not necessary that a landlord be at fault in order for it to be equitable to require him to restore that which he has illegally received”.

Woods v. McCord (1949) (C.A. 9th), 175 F. (2d) 919, 922.

This court there reversed a judgment which denied restitution. Two things are significant. In the first place, the judgment denying restitution was not reversed as to those violations which were “settled out of court”, and second, the reversal was ordered because:

“In view of the facts as set out by the entire record, *we hold that it was an abuse of sound discretion* to refuse to order restitution.”

Woods v. McCord (1949) (C.A. 9th), 175 F. (2d) 919, 922.

In the instant case this Court does not know and cannot tell what the facts were. There was a sharp conflict as to many of the facts. The District Court did not resolve those conflicts. He merely determined that appellants had failed to show why restitution should be granted, without determining what facts appellants had demonstrated, and what claimed facts they had not demonstrated.

Appellee cites *Woods v. Davis* (1950) (C.A. 9th), 185 F. (2d) 567 as holding that restitution in this case was mandatory. This Court did not so hold in that case. There two defenses to restitution seem to have appealed to the District Court. One was the financial

inability of the defendant to make restitution. The other was her good faith in charging what her predecessor had charged. The order of restitution was denied for these two reasons. Respecting these two reasons, this Court said:

“A claim of inability to refund excess rentals, unlawfully exacted of tenants, may not be considered in the trial or determination of a suit by the Expediter to obtain a restitution order * * *

“The mere fact that the defendant took over the units from another person and continued to charge the same rentals as had been charged by her predecessor affords no equitable reason for declining to order restitution of the illegal gains.”

Woods v. Davis (1950) (C.A. 9th), 185 F. (2d) 567, 569.

This Court did not order restitution. It merely remanded the cause

“for further proceedings not inconsistent with this opinion.”

Woods v. Davis (1950) (C.A. 9th), 185 F. (2d) 567, 569.

Had this Court intended to rule as appellee contends, that the language used by this Court:

“The law is no respecter of persons, and we think the best way to educate those contemplating evasion of it is to demonstrate that violation will in every case result in judgment against the wrongdoer.”

Wood v. Davis (1950) (C.A. 9th), 185 F. (2d) 567, 569,

meant that restitution was mandatory in every case, there would have been no reason for remanding that case for further proceedings. Nor can this language be reasonably interpreted as shifting the burden of proof in restitution cases.

Appellee cites *Woods v. Richman* (1949) (C.A. 9th), 174 F. (2d) 614, for the same propositions. This Court did not there so hold. There the District Court had held it was without jurisdiction to try the cause asking damages and restitution because the one year statute had run and the act which made illegal the payment of the money sought to be restored had by its own terms expired. This Court there said:

“We think, therefore, that it continues to be appropriate for the courts to consider whether an order of restitution should be made as a means of giving effect to the declared policy of Congress. The judgment appealed from is accordingly reversed and the cause remanded *with directions to the court to hear the evidence and, in the light thereof, to exercise the discretion which belongs to the court.*” (Italics ours for emphasis.)

Woods v. Richman (1949) (C.A. 9th), 174 F. (2d) 614, 616.

By this decision this Court seems to have held that whether restitution should be ordered is a matter of discretion, not a matter of right. Nor did this Court by that decision, shift the burden of proof.

Appellee cites this Court's decision in *Bowles v. Huff* (1944) (C.C.A. 9th), 146 F. (2d) 428 as holding that the District Court properly exercised its discre-

tion in the instant case. In that decision this Court did not so hold. All that this Court held in that case was that it was a proper exercise of the equity jurisdiction of the District Court to deny an injunction where there was proof that violations had ceased. This Court followed the decision of the United States Supreme Court in *Hecht Co. v. Bowles* (1944), 321 U.S. 321, 64 S. Ct. 587, 88 L. Ed. 756 that the granting of equitable relief in rent overcharge cases is subject to the same rules as the granting of equitable relief in any other set of circumstances, which is precisely the point which appellants contend the District Court disregarded. This decision supports the position of the appellants.

**APPELLEE'S AUTHORITIES DO NOT SUPPORT THEIR POSITION
THAT RESTITUTION AND TREBLE DAMAGES MAY BOTH
BE ORDERED.**

In *Mattox v. United States* (1951) (C.A. 9th), 187 F. (2d) 406, this Court spoke of the mandatory phase of the award of damages in the amount of the overcharge. This Court there said:

“This mandatory principle is in no wise affected by a grant of restitution to the tenant. Restitution is an equitable remedy resorted to under § 206(b) independently of the award of damages * * * (citations omitted) * * * Accordingly we are of the opinion that the trial court erred in denying damages *at least in the amount of the overcharges.*”

Mattox v. United States (1951) (C. A. 9th),
187 F. ((2d) 406, 408.

This Court did not hold that the right to restitution and to treble damages coexisted. In fact this Court pointed out in a footnote to its opinion:

“Where restitution is decreed and statutory damages awarded, the treble damage award appears sometimes to have been reduced by the amount of the restitution required, and this seems to have been done at the instance of the rent control authorities. See *United States v. Gianoulis*, 3 Cir. 183 F. (2d) 378; *Miller v. United States*, 5 Cir. 186 F. 2d 937. While this practice may be thought to have statutory justification, we can see no possible basis in the law for deducting the restitution award where the damages found allowable are the amount of the overcharges, only.”

Mattox v. United States (1951) (C.A. 9th), 187 F. (2d) 406, 408 Note 2.

This Court will note that the appellee refers to two decisions from other Circuits, *Woods v. Witzke* (1949) (C.A. 6th), 174 F. (2d) 855 and *United States v. Ziomek* (1951) (C.A. 8th), 191 F. (2d) 818 as holding that the Court may properly grant not only treble damages, but also order restitution of the overcharge trebled to the end that the overcharger repays four times the amount of the overcharge. In neither of these two cases was an argument presented on behalf of the appellee. Each seems to be a one sided presentation by the United States. It is submitted that except in an extreme case, which this is not, the award of restitution for that part of the damages which are trebled is an abuse of discretion and should be corrected on appeal.

CONCLUSION.

There are conflicts in the evidence. The District Court could have resolved these conflicts against appellants, and upon the evidence could have found that the evidence justified an order for restitution. Such a judgment would have been sustained by the evidence and it would have been the duty of this Court to affirm such a judgment. But the District Court did not do this.

Instead, the District Court left the record in such a condition that we do not know whether Wilson induced the overcharges or whether McKittrick induced them. We do not know whether the written lease which bound Wilson to pay only the ceiling rent was a mere subterfuge or whether Wilson paid the excess voluntarily. We do not know whether the appellants lost money by letting Wilson occupy the house or not, or whether Wilson induced the appellants not to occupy the house. We do not know what the equities are. It was the duty of the District Court to make all these determinations. It is beyond the province of this Court to make such a determination on the record alone.

It is submitted that if Wilson trapped appellants into this situation, and induced them not to occupy their own house for the sole purpose of later asking for restitution, and if he was the oppressor, not the oppressed, it would have been an abuse of discretion to allow him to have restitution.

Where, instead of resolving these conflicts the District Court decided it was mandatory upon him to

order restitution unless appellants shouldered the burden of proving that restitution should not be granted, the District Court failed to follow the established rules of equity which place the burden of proof upon the plaintiff, and this error should be corrected.

This error was brought to the attention of the District Court and he was shown that he could amend his findings and properly arrive at the same judgment. This the District Court chose not to do. Instead he chose to present to this Court the determination of a question which has as yet been undecided. Although the decisions cited in our opening brief indicate the District Court was in error, the District Court chose to base his decision not on his conclusions from the evidence offered, but on the basis that it was *mandatory* on him to order restitution unless the appellants established a burden of showing that restitution should not be granted.

The judgment should be reversed.

Dated, Berkeley, California,
March 26, 1952.

Respectfully submitted,

FRANCIS T. CORNISH,

Attorney for Appellants.

No. 13090

United States
Court of Appeals
for the Ninth Circuit

HARTFORD FIRE INSURANCE COMPANY, a
corporation,

Appellant,

vs.

ESLI H. DANIELS and HELEN J. DANIELS,
Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

FEB - 6 1952

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

PAUL P. O'BRIEN

United States
Court of Appeals
for the Ninth Circuit

HARTFORD FIRE INSURANCE COMPANY, a
corporation,

Appellant,

vs.

ESLI H. DANIELS and HELEN J. DANIELS,
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Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

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Jeffers, Paul E.

—cross 141

—redirect 146

Kilgore, John

—direct 167

—cross 167

Perlitter, Simon

—direct 89

—cross 99

—redirect 105

—recross 107

Transcript of Proceedings—(Cont'd)

Witnesses—(Cont'd)

Pinkus, Jerome

—direct 146

—cross 147

Quinn, Robert E.

—direct 141

—cross 141

Reynard, Emeron

—direct 78

—cross 82

Shield, John E.

—direct 122

—cross 125

Ward, John

—direct 132

—cross 132

Wing, Kenneth S.

—direct 108

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

HINDMAN & DAVIS,
510 Financial Center Bldg.,
704 S. Spring St.,
Los Angeles 14, Calif.

For Appellees:

ARCH E. EKDALE,
JOHN F. McCARTHY,
1104 Security Bldg.,
Long Beach 2, Calif. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court, Southern
District of California, Central Division

No. 12,506-BH

ESLI H. DANIELS and HELEN J. DANIELS,
Plaintiffs,

vs.

HARTFORD FIRE INSURANCE COMPANY,
a corporation,
Defendant.

PETITION FOR REMOVAL

To the above entitled Court and to the Judge or
Judges thereof:

The Petition of Defendant Hartford Fire Insurance Company, a Corporation, respectfully shows:

I.

That the Defendant Hartford Fire Insurance Company is now and at all times herein mentioned has been a corporation organized and existing under the laws of the State of Connecticut, with its principal place of business in Hartford in said State, and is now and was at the time of the commencement of the foregoing entitled action, and at all times in the Plaintiffs' complaint and in this action mentioned a citizen and resident of the State of Connecticut, and a non-resident of the State of California.

II.

That the Plaintiffs Esli H. Daniels and Helen J.

Daniels [2] are now, and were at the time of the commencement of the foregoing entitled action, and at all times in the Plaintiffs' complaint and this petition mentioned, citizens and residents of the State of California.

III.

That the above entitled cause is a suit of a civil nature over which the United States District Court has original jurisdiction, and in which is involved a controversy wholly between citizens of different states, to wit, between the Plaintiffs, citizens and residents of the State of California, and the Defendant, Hartford Fire Insurance Company, a corporation, a citizen and resident of the State of Connecticut.

IV.

That the amount in controversy between Plaintiffs and the petitioning Defendant exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000.00), and is an action by Plaintiffs against this petitioning Defendant to recover on an alleged contract of insurance the sum of Fourteen Thousand Four Hundred Fifty Dollars (\$14,450.00), together with costs from this petitioning Defendant.

V.

That this Defendant disputes said demand of the Plaintiffs and will appear, answer and defend against the same.

VI.

That the foregoing entitled cause was commenced in the Superior Court of the State of California in and for the County of Los Angeles on the 9th day of October, 1950, by the Plaintiffs filing with the Clerk of said Court a complaint in said action and causing summons to be issued directed to this petitioning Defendant; that this petitioning Defendant received a copy of the initial proceedings herein set forth on the 16th day of October, 1950, by service upon it at San Francisco, California, of a copy [3] of the Plaintiffs' Complaint and Summons filed in and issued by the aforesaid Superior Court of the State of California, in and for the County of Los Angeles.

VII.

That your Petitioner accompanies this Petition and files herewith a bond with good and sufficient surety conditioned that Defendant will pay all costs and disbursements incurred by reason of the removal proceedings, should it be determined that the case was not removable or was improperly removed, and also files herewith a copy of all processes and pleadings served upon it in such action.

VIII.

That the petitioning Defendant desires that said cause be removed from the Superior Court of the State of California, in and for the County of Los Angeles, to the United States District Court, Southern District of California, Central Division, and

prays that said Bond be accepted and that said cause be so removed.

HARTFORD FIRE INSURANCE
COMPANY

/s/ By E. EUGENE DAVIS,
Its Attorney.

Duly Verified.

[Endorsed]: Filed Nov. 3, 1950. [4]

In the Superior Court of the State of California in
and for the County of Los Angeles

No. LBC—61,920

ESLI H. DANIELS and HELEN J. DANIELS,
Plaintiffs,

vs.

HARTFORD FIRE INSURANCE COMPANY,
a corporation,
Defendant.

COMPLAINT

(On Insurance Policy)

Plaintiffs complain of defendant and for cause
of action allege:

I.

At all times herein mentioned defendant Hartford
Fire Insurance Company was and now is a cor-
poration and was and now is duly licensed and au-
thorized to do an insurance business in the State
of California.

II.

At all times herein mentioned plaintiffs were and now are husband and wife.

III.

At all times herein mentioned plaintiffs, as joint tenants, owned a certain frame building situated at 3003 Palos Verdes Drive, East, Palos Verdes, California, the same being located upon Lot H, [9] Rancho Los Palos Verdes, Los Angeles County, California.

IV.

On or about December 1, 1948 defendant issued to plaintiffs, upon said building, a written policy of insurance, a copy of which is attached hereto marked "Exhibit A", and in consideration thereof plaintiffs paid defendant a premium in the sum of \$120.00, as set forth in said policy.

V.

On or about March 9, 1949 defendant, by endorsement of said policy of insurance, effective as of March 4, 1949, increased the amount of insurance on said building under said policy from the sum of \$10,000.00 to the sum of \$15,000.00 and issued its written endorsement of said policy, a copy of which is attached hereto marked "Exhibit B", and in consideration of the issuance thereof and the increase in the amount of said insurance plaintiffs paid defendant an additional premium in the sum of \$54.90, as set forth in said endorsement.

VI.

Said policy of insurance was issued for the term of three years beginning on December 1, 1948 and ending on December 1, 1951, and at all times herein mentioned said policy of insurance was and is now in full force and effect, and at all times since March 4, 1949 said endorsement of said policy of insurance, was and now is in full force and effect.

VII.

On or about December 19, 1949 plaintiffs suffered direct loss to said property so insured by said policy of insurance caused by perils insured by said policy of insurance. Said direct loss was caused by explosion occurring in said building so insured and from hazards inherent therein, and resulted in the rupture or bursting of a water pipe which was a part of the insured building and caused the reinforced concrete slab forming a part of said [10] building to be deformed and cracked and caused the door and window frames, floors and plaster of said building to be cracked, deformed and damaged and by reason thereof said property so insured by said policy of insurance, and plaintiffs were damaged in the sum of \$14,450.00. Said loss and damage was not caused by explosion originating within steam boilers, steam pipes, steam turbines, steam engines or fly wheels and was not caused by explosion, rupture or bursting of steam boilers, steam pipes, steam turbines, steam engines or fly wheels.

VIII.

Plaintiffs are informed and believe and on that ground allege that at all times herein mentioned Hamman & Avery, a partnership, was and now is the duly authorized agent of defendant in connection with all matters pertaining to said policy of insurance.

IX.

On or about December 21, 1949 plaintiffs notified defendant of said loss by reporting the same to said Hamman & Avery, as agent of defendant, and at said time plaintiffs inquired of said agent as to whether or not any action was required of plaintiffs under said policy of insurance. Said Hamman & Avery, acting as agent for defendant, at said time, informed plaintiffs that said loss was not covered by said insurance policy and that defendant was not obligated, under the terms of said policy of insurance, to indemnify plaintiffs for said loss or any part thereof. Plaintiffs believed and relied upon said statement of said Hamman & Avery and believing and relying thereon, plaintiffs refrained from filing Proof of Loss under said policy of insurance or taking any further action thereon until after the expiration of more than sixty days after December 19, 1949. Plaintiffs did not discover that said loss was covered by said policy of insurance until after the expiration of more than sixty days after said loss. [11]

X.

On July 31, 1950 plaintiffs rendered to defendant, at its main office in California, written Proof of

Loss, a copy of which is attached hereto, marked "Exhibit C".

XI.

On or about August 8, 1950 defendant served a notice in writing upon plaintiffs, a copy of which is attached hereto, marked "Exhibit D".

XII.

Plaintiffs have performed all of the terms, covenants and conditions of said insurance policy as so endorsed on the part of plaintiffs to be performed.

XIII.

Defendant has failed, neglected and refused to pay plaintiffs said sum of \$14,450.00 or any part thereof and there is now due, owing and wholly unpaid from defendant unto plaintiffs the sum of \$14,450.00.

Wherefore plaintiffs pray judgment against defendant in the sum of \$14,450.00, for their costs herein incurred and for such other and further relief as may be just.

ARCH E. EKDALE and
JOHN F. McCARTHY,
By JOHN F. McCARTHY,
Attorneys for Plaintiffs. [12]

State of California,
County of Los Angeles—ss.

Esli H. Daniels being first duly sworn, says that he is one of the plaintiffs in the above entitled action; that he has read the foregoing Complaint, and

knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief and as to those matters that he believes it to be true.

ESLI H. DANIELS

Subscribed and sworn to before me this 9th day of October, 1950.

JOHN F. McCARTHY,

Notary Public in and for said County and State.

No. 515285

NO OTHER INSURANCE PERMITTED EXCEPT BY
AGREEMENT ENDORSED HEREON OR ADDED HERETO
(See Clause "Permission Granted")

A CAPITAL
STOCK COMPANY

HARTFORD FIRE INSURANCE COMPANY



ORGANIZED 1861
CHARTERED 1861

HARTFORD CONNECTICUT

MAIN OFFICE IN CALIFORNIA, HARTFORD BLDG., SAN FRANCISCO

| | | | | | |
|---|-----------|------|------|------------|----------------------------|
| FIRE AMOUNT: \$ | 10,000.00 | RATE | 1.00 | PREMIUM \$ | 100.00 |
| EXTENDED COVERAGE* | | RATE | .15 | PREMIUM \$ | 15.00 |
| | | RATE | .05 | PREMIUM \$ | 5.00 |
| V. & M. M. LTD. | | | | | TOTAL PREMIUM \$ 120.00 |
| NO INSURANCE ATTACKS IN CONNECTION WITH EXTENDED COVERAGE PERMS UNLESS "RATE" AND "PREMIUM" IS SPECIFIED ABOVE. | | | | | |

In Consideration of the Stipulations Herein Named and of

1. include direct loss to the insured property from "causes" as hereinafter defined.
2. THE TERM "VANDALISM AND MALICIOUS DAMAGE" AS USED HEREIN IS RESTRICTED TO AND INCLUDES ONLY WILLFUL OR MALICIOUS PHYSICAL INJURY TO OR DESTRUCTION OF THE DESCRIBED PROPERTY.
3. WHEN THIS ENDORSEMENT IS ATTACHED TO A POLICY COVERING DIRECT LOSS TO THE DESCRIBED PROPERTY, THIS COMPANY SHALL BECOME LIABLE UNDER THIS ENDORSEMENT FOR ANY LOSS
4. TO GLASS (OTHER THAN GLASS BUILDING BLOCKS), CONSTITUTING A PART OF THE BUILDING;
5. FROM PILFERAGE, THEFT, BURGLARY OR LARCENY;
6. FROM EXPLOSION ORIGINATING IN STEAM BOILERS, STEAM TUBES, STEAM ENGINES, FLY WHEELS, LOCATED IN THE BUILDING INSURED OR IN PIPING(S) CONTAINING THE PROPERTY INSURED;
7. FROM EXPLOSION ORIGINATING IN THE BUILDING INSURED OR IN PIPING(S) CONTAINING THE PROPERTY INSURED, FROM ANY OTHER CONSEQUENTIAL OR INDIRECT LOSS OF ANY KIND, FORCES, INCLUDING ACTION TAKEN BY THE INSURED TO PREVENT OR MINIMIZE SUCH LOSS;
8. CAUSED, DIRECTLY OR INDIRECTLY, BY: ENEMY ATTACK OR AN IMMEDIATELY IMPENDING ENEMY ATTACK; MILITARY, NAVAL OR AIR FORCES; HOSTILITIES; REVOLUTION; CIVIL WAR; UNLAWFUL INVASION; INSURRECTION; REBELLION; OR ANY OTHER CAUSE OF WAR OR OCCUPANCY;
9. WHEN THIS ENDORSEMENT IS ATTACHED TO A POLICY COVERING BUSINESS INTERRUPTION (USE AND OCCUPANCY), EXTRA EXPENSES, LOSS OF PROFITS AND COMMISSIONS, THIS COMPANY SHALL NOT BE LIABLE FOR LOSS OF PROFITS OR COMMISSIONS.
10. FROM ANY OF THE CAUSES LISTED IN SUBDIVISIONS (B), (C), (D) OR (E) OF PARAGRAPH NO. 1.
11. THE PERMITTED PERIOD OF VACANCY AS PROVIDED BY SAID FIRE POLICY SHALL APPLY TO LIABILITY UNDER THIS ENDORSEMENT EXCEPT WHEN SUCH PERMITTED PERIOD IS SPECIFICALLY EXCLUDED BY THE POLICY.
12. SHALL NOT BE LIABLE FOR LOSS UNDER THIS ENDORSEMENT OCCURRING WHILE THE DESCRIBED BUILDING IS VACANT BEYOND A PERIOD OF THIRTY DAYS, WHETHER OR NOT SUCH PERIOD COMMENCED PRIOR TO THE INCEPTION DATE OF THIS ENDORSEMENT.

515285

Attached to and forming part of Policy No.

Hartford Fire Insurance Company
Name of Insurance Company
Long Beach, California
Agency
December 1, 1948
Date



MADE IN U.S.A.
JULY 1864

1 Bureau
HAMMAN & AVEY
Agent

STIPULATIONS AND CONDITIONS SPECIALLY REFERRED TO

Page 2

31 *Property not covered.* (a) This company shall not be liable for loss to accounts, bills, currency, evidences of
32 debt or interest, promissory notes, drafts, checks, money orders or receipts, nor (b) unless liability is specifically
33 assumed, contents of drawings, dies, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, business
34 cards or other furniture or fixtures, sculptures, tapestries, decorations, or property held on storage for resale.

35 *Hazards not covered.* This company will not be liable for loss (a) if the, or (b) by neglect of the insured to
36 use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire, or
37 (c) (unless fire occurs, and in that event for the damage by fire only) by explosion of any kind or lightning, or (d) by invasion,
38 intrusion, riot, civil war, or commotion, or (except as hereinafter provided) by military or unwarped power, or order of any civil
39 authority, but the company will be liable (unless otherwise provided by endorsement hereon or added hereto) if the property is
40 lost or damaged, by fire or otherwise, by civil authority or military or unwarped power exercised to prevent the spread of the riot
41 or arising from a cause existing hereunder and which fire otherwise probably would have caused the loss of or damage to the
42 insured property.

43 *Matters avoided policy.* This entire policy shall be void, (a) if the insured has concealed or misrepresented any
44 material fact or circumstances concerning this insurance or the subject thereof, or (b) in case of any fraud or false swearing by the
45 insured, or (c) if the insured has failed to pay the premium due on the subject thereof, whether before or after a loss.
46 Unless now or hereafter provided by agreement endorsed hereon or added hereto, the entire policy shall be void, (a) if the
47 insured now has or shall procure any other insurance, whether valid or not, on the property insured, or (b) if the insured
48 or (b) if the interest of the insured be in other than unconditional and sole ownership, or (c) if the subject of the insuring
49 on ground not owned by the insured be in fee simple, or (d) if with the knowledge of the insured hereinafter proceeding to be com-
50 menced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed, or (e) if this policy
51 be assigned before a loss.

52 *Matters suspending insurance.* Unless otherwise provided by agreement endorsed hereon or added hereto
53 this company shall not be liable for loss or damage occurring (a) while the hazard be materially increased by any means within
54 the control of the insured; or (b) if the subject of insurance be a manufacturing establishment, while it is operated in whole or in
55 part at night later than ten o'clock or while it ceases to be operated beyond the period of ten consecutive days; or (c) while
56 mechanics or artisans are employed in building or altering or repairing the described premises for more than fifteen days at any one
57 time; or (d) while illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or (e)
58 while there be kept, used or allowed on the described premises (any use of custom of trade or manufacture to the contrary not-
59 withstanding) calcium carbide, phosphorus, dynamite, anaglycerine, fireworks or other explosives; or extending one quarter each of
60 because, gasoline, naphtha or ether, or more than twenty-five pounds of gunpowder; or (f) while a building herein described
61 whether intended for occupation by owner or tenant is vacant or unoccupied beyond the period of ten (10) consecutive days;
62 (g) while the interest in, title to or possession of the subject of insurance is changed excepting—(1) by the death of the insured;
63 (2) a change of occupancy of building without material increase of hazard; and (3) transfer by one or more several copartners
64 or co-tenants to the others.

65 Such suspension shall not extend the term of this policy nor create any right for refund of the whole or any portion of
66 premium, and shall not affect the respective rights of cancellation.

67 *Chattel mortgage.* Unless otherwise provided by agreement in writing endorsed hereon or added hereto this
68 company shall not be liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage, but
69 the liability of the company upon other property hereby insured shall not be affected by such chattel mortgage.

70 *Material building clause.* Unless otherwise provided by agreement endorsed hereon or added hereto, if a build-
71 ing or any material part thereof fail, except as the result of fire, all insurance by this policy on such building or its contents shall
72 immediately cease.

73 *Removal when endangered by fire.* Should any of said property be so seriously removed because of danger
74 from fire, and there is no other insurance thereon, that part of this policy in excess of the value of the interest property remaining
75 in the original location, or, if there is other insurance thereon, that part of this policy in excess of as proportion of the value of the
76 insured property remaining in the original location, shall, for the ensuing five days only, cover said removed property as its new
77 location or locations.

78 *Cancellation.* This policy shall be cancelled at any time at the request of the insured, in which case the com-
79 pany shall, upon surrender of this policy, refund the excess of paid premium above the customary short rates for the expired
80 time. This policy may be cancelled at any time, without tender of unexpired portion of premium, by the company by giving
81 notice. Any written notice of cancellation must be in writing and must be countersigned by the insured party to whom the written consent
82 of the company is required. The company shall, upon receipt of the written notice, return to the insured party the policy or reli-
83 quishment of liability thereunder, refund the excess of paid premium above the pro rata premium for the expired time.

84 *Duty of insured in case of loss.* When a loss occurs the insured must give to this company written notice
85 thereof as soon as practicable and must immediately deliver to the company the property then insured and separate the damaged and
86 undamaged portions of the property. The insured shall also deliver to the company a complete inventory
87 stating as far as possible the quantity and cost of each article and the amount claimed thereon.

88 Within sixty days after the commencement of the fire the insured shall render to the company at its main office in
89 California named herein preliminary proof of loss consisting of a written statement signed and sworn to by him setting forth:—
90 (a) his knowledge and belief as to the origin of the fire; (b) the interest of the insured and of all others in the property; (c) the
91 cash value of the different articles or properties and the amount of loss thereon; (d) all incumbrances thereon; (e) all other
92 insurance, whether valid or not, covering any of said articles or properties; (f) a copy of the decrees and schedules in all
93 other policies unless similar to this policy, and in that event, a statement as to the amounts for which the different articles or prop-
94 erties are insured in each of the other policies; (g) any changes of title, use, occupation, location or possession of said property
95 since the issuance of this policy; (h) by whom and for what purpose any building herein described, and the several parts
96 thereof, were occupied at the time of the fire.

97 If the company claims that the preliminary proof of loss is defective and within five days after the receipt thereof
98 (without admitting the amount of loss or any part thereof) notifies in writing the insured, or the party making such proof of loss, of
99 the alleged defect (specifically stating them) and requests that they be remedied by verified statements the insured or such party
100 shall have ten days after receipt of such notice to correct such deficiencies and request must comply therewith or, if unable so to do, present to the
101 company a statement in affidavit to that effect.

102 The insured shall also furnish, if required, as far as is practicable to obtain the same, verified plans and specifications of
103 any buildings, fixtures or machinery destroyed or damaged, and the insured shall exhibit to all persons designated in writing by
104 this company all that remains of any property herein described and shall submit to examination under oath, as often as required,
105 by any such person, and subscribe to the testimony so given and shall produce to such person for examination all books of account,
106 bill, invoices and other vouchers, and permit extracts and copies thereof to be made, and in case the originals are lost certified
107 copies, if obtainable, shall be produced.

108 *Ascertainment of amount of loss.* This company shall be deemed to have ascertained to the amount of the
109 loss claimed by the insured in the preliminary proof of loss, unless within twenty days after the receipt thereof, or, if verified
110 amendments have been received, within twenty days after their receipt, or within twenty days after the receipt of an affidavit
111 that the insured is unable to furnish such amendments, the company shall notify the insured in writing of its partial or total
112 disagreement with the amount of loss claimed by him and shall also notify him in writing of the amount of loss, if any, the
113 company admits on each of the different articles or properties set forth in the preliminary proof or amendments thereto.

114 If the insured and this company fail to agree, in whole or in part, as to the amount of loss or part of loss to which there is a
115 disagreement, and shall not have reached agreement within ten days after the receipt of the preliminary proof or amendments
116 demanded and name, shall appoint a competent and disinterested appraiser, and the insured shall, within five days after receipt of such
117 demand and name, shall appoint a competent and disinterested appraiser, and the insured shall, within five days after receipt of such
118 two so chosen shall before commencing the appraisement, select a competent and disinterested umpire.

119 The appraisers together shall estimate and appraise the loss or part of loss as to which there is a disagreement, taking
120 separately the sound value and damage, and if they fail to agree they shall submit their differences to the umpire, and the award
121 in writing duly verified of any two shall determine the amount or amounts of such loss.

122 The parties to the appraisement shall pay the appraisers respectively amount for their fees and shall bear equally the expenses

124 of the appraisement and the charges of the umpire.

125 If for any reason not attributable to the insured, or to the appraiser appointed by him, an appraisement is not had and

126 completed within ninety days after said preliminary proof of loss is received by this company, the insured is not to be prejudiced

127 by the failure to make an appraisement, and may prove the amount of his loss in an action brought without such appraisement.

128 **Options of company in case of loss.** This company may, at its option, take all or any part of the

129 portion of its liability hereunder is claimed as its appraisement or appraised value, and may also, at its option, in sub-

130 stitution of its liability hereunder, repair, rebuild or replace any building or structure or machine or machinery used therein, with

131 other of like kind and quality, within a reasonable time, upon giving notice within twenty days of its intention so to do after the

132 receipt of it of the preliminary proof of loss, or, if verified amendments have been requested, within twenty days after their

133 receipt, or, within twenty days after the receipt of an affidavit that the insured is unable to furnish such amendments.

134 There can be no abandonment to this company of any property.

135 **Apportionment of loss.** This company shall not be liable under this policy for a greater proportion of any loss

136 on the described property, or for loss by, and expenses of, removal from the premises endangered by fire, than the amount hereby

137 insured bears to the entire insurance covering such property whether valid or not, by or solvent or insolvent insurers.

138 **Loss when payable.** A loss hereunder shall be payable in thirty days after the amount thereof has been ascer-

139 tained either by agreement or by appraisement, but if such ascertainment is not had or made within sixty days after the receipt

140 by the company of the preliminary proof of loss, then the loss shall be payable in ninety days after such receipt.

141 **Non-waiver by appraisal or examination.** This company shall not be held to have waived any pro-

142 vision or condition of this policy or any forfeiture thereof, by assenting to the amount of the loss or damage or by any require-

143 ment, act, or proceeding on its part relating to the appraisal or to any examination herein provided for.

144 **Subrogation.** If this company shall claim that the fire was caused by the act or neglect of any person or corporation,

145 this company shall, on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured for

146 the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

147 **Time for commencement of action.** No suit or action on this policy for the recovery of any claim shall be

148 maintained, until after full compliance by the insured with all of the foregoing requirements, nor unless begun within fifteen months

149 next after the commencement of the fire.

150 **Definitions.** Wherever in this policy the word "insured" occurs, it shall be held to include the legal representatives

151 of and the insured in case of his death, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage,"

152 and wherever the words "the time of loss or damage" are used they shall be deemed the equivalent of "the time of the com-

153 mencement of the fire."

This policy, subject to all its stipulations and conditions, is hereby extended to cover loss by fire only in the same manner

and to the same extent as though the words "riot" and "or commotion" were not in line 39 of the printed conditions of the policy.

ADDED PROVISIONS

"Item 1 shall cover the building, including additions in conflict therewith, occupied principally for dwelling, except for the dwelling of the insured, also, if the property of the owner be described, also freestanding and all other descriptions per-

manently affixed to and constituting a part of the described building, lawn, also, if the property of the owner be described, also freestanding and all other descriptions per-

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Exhibit A—(Continued)

Policy Form No Cal. 5' and.

SCHEDULE "A" — POLICY F.

Dated December 1, 1948

Item 1 \$ 15,000.00 on Shingle roof frame building

Item 2 \$ on

Item 3. \$ on

Item 4 \$ on

Item 5. \$ on

Situate

Coinsurance, Average, or Distribution Clause, if any

Loss, if any, payable to \$ insureds

SCHEDULE "B"

STATEMENT OF CASH VALUE AND LOSS AND DAMAGE

Schedule B.

The damage consists principally of deformation of the reinforced concrete slab forming a part of the dwelling with accompanying cracking of the concrete, deformation of door and window frames, swelling and heaving of hardwood floors, plaster cracks and related damage. Necessary repairs will include removal of hardwood floors, base trim, cabinet work, door and window trim, removal of reinforced concrete slab floor in affected rooms and the replacement of all thereof with apartment heating coils, hardwood and other floors. The reasonable and necessary cost of performing such work is the sum of \$14,450.00. Reference is made to a report of Perliter & Foring, Consulting Engineers, dated April 20, 1950, a copy of which has been submitted to Hartford Fire Insurance Company.

Notice of said loss was given to an agent of Hartford Fire Insurance Company on or about December 21, 1948. Said agent then informed the assured that said loss was not covered by said policy. By reason thereof, the assured refrained from filing proof of loss. On May 2, 1950 said report of Perliter & Foring was submitted to the General Adjustment Bureau, Inc. for the account of Hartford Fire Insurance Company and between that date and on or about July 10, 1950, said damage was fully inspected and said claim was investigated by Hartford Fire Insurance Company. The assured was not notified until after July 10, 1950 of the conclusion of said investigation or the action taken thereon by said Company.

SCHEDULE "C" — APPORTIONMENT

Policy No.

Name of company

Item No
Insures

Pays

Item No
Insures

Pays

None

15,000.00

Date 12/1/51

515285
Agency at

PROOF OF LOSS

Long Beach, California

12/1/51

To the Hartford Fire Insurance Company

of Hartford, Connecticut

By the above indicated policy of insurance you insured

Eslie H. Daniels and Helen J. Daniels

against loss by "Fire". Extended coverage upon the property described under Schedule "A," according to the terms and conditions of the said policy and all forms, endorsements and assignments attached thereto.

1. Time and Origin: A loss occurred about the hour of 11 o'clock M., on the 19th day of December, 1951. According to the knowledge and belief of the assured, the loss resulted from explosion occurring in the insured property, caused by the unintentional entry of steam in a cold water pipe resulting in rupture or bursting thereof, causing the damage described in Schedule B.

2. Occupancy: The building described, or containing the property described, was occupied at the time of the loss as follows, and for no other purpose whatever:
Dwelling

3. Title and Interest: When this policy was acquired and at the time of the loss the interest of your insured in the property described therein was sole and unconditional ownership, and no other person or persons had any interest therein or incumbence therein. (State exceptions, if any.)

No exceptions

4. Changes: Since the said policy was acquired there has been no assignment thereof, or change of ownership, use, occupancy, possession, location or exposure of the property described, or of your insured's interest therein. (State exceptions, if any.)

No exceptions

5. Total Insurance: The total amount of insurance upon the property described by this policy was, at the time of the loss, \$ 15,000.00 as more particularly specified in the apportionment attached under Schedule "C," besides which there was no policy or other contract of insurance, written or oral, valid or invalid.

6. The Cash Value of said property at the time of the loss was - - - - - **at least** - - - \$ 50,000.00

7. The Whole Loss and Damage as stated under Schedule "B" was - - - - - \$ 14,450.00

8. The Amount Claimed under the above numbered policy is - - - - - \$ 14,450.00

The said loss did not originate by any act, design, or procurement on the part of your insured, or this affiant; nothing has been done by or with the privity or consent of your insured or this affiant, to violate the conditions of the policy, or render it void, no articles are mentioned herein or in annexed schedules but such as were in the building damaged or destroyed, and belonging to, and in possession of the said insured at the time of said loss; no property saved has in any manner been concealed, and no attempt to deceive the said company, as to the extent of said loss, has in any manner been made. Any other information that may be required will be furnished and considered a part of this proof.

The furnishing of this blank or the preparation of proofs by a representative of the above insurance company is not a waiver of any of its rights.

State of California

County of Los Angeles

Severally

Subscribed and sworn to before me this 14 day of July, 1951

NOTARY PUBLIC
FEBRUARY 1967

EXHIBIT C

(Seal)

JOHN F. MCCARTHY
NOTARY PUBLIC

State of California

Notary Public

Eslie H. Daniels Insured
Helen J. Daniels Insured

EXHIBIT "D"

[Letterhead of Hindman & Davis]

Copy

August 8, 1950

Esli H. Daniels and Helen J. Daniels
c/o John F. McCarth, Attorney at Law
Security Bldg., Long Beach, California.

Re: Hartford Fire Insurance Company
Policy No. 515285

Dear Sir and Madam:

Document entitled "Sworn Statement in Proof of Loss" signed and sworn to by each of you and making claim against Hartford Fire Insurance Company in the amount of \$14,450.00 for loss alleged therein to have occurred on December 19, 1949, to certain of the property described in the above numbered policy was received by the Hartford Fire Insurance Company at its San Francisco office on July 31, 1950.

You Are Hereby Notified that Hartford Fire Insurance Company objects to said Sworn Statement in Proof of Loss specifically upon the ground of delay in presenting the same to it, and delay in notifying it of said claim for loss, said alleged loss, according to your sworn statement, having occurred on December 19, 1949, and no notice thereof having been given to said company until April 19, 1950, and no Proof of Loss having been received by it until receipt of the above-referred to document.

You Are Further Notified that the Hartford Fire Insurance Company, complying with the terms and

conditions of the above numbered policy and in protection of its interest thereunder, totally disagrees with the amount of loss claimed by you in said Proof of Loss, and does not admit that you suffered loss on each or any of the different articles or properties set forth in said Proof of Loss.

You Are Further Notified that Hartford Fire Insurance Company denies that any loss by explosion, or by any other peril insured against by the afore-referred to policy of insurance, occurred at the premises described therein on December 19, 1949, or at any other time at all.

By making the foregoing objections and denials, Hartford Fire Insurance Company does not waive, and shall not be deemed to have waived, [21] any of the terms or conditions of the aforereferred to policy of insurance, or of any of its rights therein or thereunder, or in the premises, but all of its rights under said policy and in the premises are hereby specifically reserved.

Yours very truly,

HARTFORD FIRE INSURANCE
COMPANY

By E. EUGENE DAVIS,
Its Attorney.

EED:fml

cc: Esli H. Daniels & Helen J. Daniels, 3003 Palos
Verdes Drive East. [22]

[Endorsed]: Filed Oct. 9, 1950.

[Title of District Court and Cause.]

BOND ON REMOVAL OF CAUSE

Know All Men by These Presents:

That the undersigned, Hartford Fire Insurance Company, a Corporation, Defendant herein, as Principal, and Hartford Accident and Indemnity Company, a corporation, authorized to and doing business in the State of California, as a surety on bonds of undertaking in said State, as surety, are held and firmly bound unto Esli H. Daniels and Helen J. Daniels, Plaintiffs, in the sum of One Thousand Dollars (\$1,000) lawful money of the United States, to be paid to said Plaintiffs, their successors or assigns, for which payment well and truly to be made, the undersigned bind themselves, their successors and assigns firmly by these presents.

Sealed with our seals and dated this 3rd day of November, 1950.

The condition of the above obligation is such that: [23]

Whereas, said Defendant Hartford Fire Insurance Company, a Corporation, has filed in the United States District Court, Southern District of California, Central Division, its Petition for Removal of the above entitled cause from the Superior Court of the State of California, in and for the County of Los Angeles, to said District Court and has filed therewith all processes, pleadings and orders served upon it in said action in said Superior Court, as provided by law,

Now, Therefore, if said Defendant shall well and

truly pay all costs and disbursements incurred by reason of said removal proceedings, should it be determined that the case was not removable or was improperly removed, then this obligation shall be void; otherwise, it shall be and remain in full force and effect.

HARTFORD FIRE INSURANCE
COMPANY

/s/ By E. EUGENE DAVIS

Its Attorney

HARTFORD ACCIDENT AND
INDEMNITY COMPANY

/s/ By J. THORNTON McCARTHY

Attorney-In-Fact

Examined and Recommended for Approval as
provided in Rule 8.

/s/ By E. EUGENE DAVIS

Attorney at Law

I hereby approve the foregoing.

Dated: November 3, 1950.

EDMUND L. SMITH

Clerk U. S. District Court, South-
ern District of California

/s/ By G. A. SAUNDERS

State of California,
County of Los Angeles—ss.

On this 3rd day of November, in the year 1950,
before me, Eleanor G. Davis, a Notary Public in and
for said County, residing therein, duly commissioned
and sworn, personally appeared J. Thornton Mc-

Carthy, known to me to be the Attorney-in-Fact of the Hartford Accident and Indemnity Company, the Corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the Corporation therein named, and he acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ ELEANOR G. DAVIS,
Notary Public in and for the County of Los Angeles, State of California. My Commission Expires May 27, 1951. [24]

[Endorsed]: Filed Nov. 3, 1950.

[Title of District Court and Cause.]

ANSWER

Comes Now Defendant, and for answer to Plaintiffs' Complaint:

I.

As to the allegations of paragraph VII of said Complaint, Defendant denies said allegations and each and every allegation, matter and thing in said paragraph VII contained, except as to the allegation that Plaintiffs were damaged in the sum of \$14,450.00, and as to said allegations alleges that it is without knowledge or information sufficient to form a belief as to the truth of said allegations.

II.

As to the allegations of paragraph VIII of said Complaint, Defendant admits that Hamman & Avery, a partnership, was the agent of Defendant authorized to execute and deliver policies of insurance [25] for Defendant, but denies that it was authorized in all or any other matters pertaining to said policy of insurance.

III.

As to the allegations of paragraph IX of said Complaint, Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph IX.

IV.

As to the allegations of paragraph XII of said Complaint, Defendant denies that Plaintiffs performed all of the terms of said insurance policy, and particularly denies Plaintiffs performed the terms of the insurance policy relating to notice and proof of loss.

V.

As to the allegations of paragraph XIII of said Complaint, Defendant admits that it has refused to pay Plaintiffs the sum of \$14,450.00, or any part thereof, but denies that there is now or was at the time of the commencement of the foregoing entitled action, or at any other time, or at all, due, owing and unpaid, or due, owing or unpaid from Defendant to Plaintiffs the said sum of \$14,450.00, or any other sum at all.

Wherefore, Defendant prays that Plaintiffs take nothing by their Complaint, and that Defendant go hence and have and recover its costs and disbursements herein.

/s/ E. EUGENE DAVIS
HINDMAN & DAVIS

/s/ By E. EUGENE DAVIS
Attorneys for Defendant [26]

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 7, 1950.

[Title of District Court and Cause.]

MEMORANDUM OPINION

Plaintiffs brought this action for a loss which they allege was covered by the extended coverage rider on a fire insurance policy issued by the defendant through its agent.

The amount of the loss is not in dispute.

Two questions of fact are presented to me for decision as follows:

1. Was the loss caused by an explosion within the meaning of the extended coverage rider attached to the insurance policy?

2. Did the insurer waive the requirement of submitting proof of loss within sixty days as provided by the policy?

The facts concerning the explosion feature are somewhat similar to *Olds Seed Co. v. Commercial Union Assurance Co.*, 179 F. 2d 427. The complaint in this action is modeled after the *Olds* case.

The determination of the cause of the breaking of the water pipe in question resulted in a battle of the experts. Naturally, the [28] expert for the plaintiffs held that the break was due to internal pressure, while, as expected, the experts for the defendant claimed the break was caused by external stress based upon varying theories.

There are certain facts that convince me the break in the water pipe was due to an explosion or rupture caused by internal pressure. It is undisputed that the thermostat on the hot water heater was defective and that the hot water was brought to an excessive heat over an extended period of time. It is also apparent that the water pipe involved was subjected to great pressure. The breaking of the pipe, the discovery of the overheating and the opening of the faucets all occurred simultaneously. Was the breaking of the water pipe a mere co-incident? I think not. The water pipe broke at its weakest point. How weak the pipe was and what amount of pressure this particular pipe would withstand no one knows.

After considering the entire evidence I am satisfied the breaking of the pipe was the result of an explosion within the terms of the extended coverage rider to the policy.

The insurance contract contained the usual provision requiring the filing of the proofs of loss within sixty days as a condition precedent to any recovery for loss under the policy. The defendant now relies upon a delay in the filing of such proof of loss as a defense to this action.

The loss occurred on December 19, 1949, and the agent Avery was notified on December 21, 1949. The local office of the defendant in Los Angeles first admits hearing of the loss on April 19, 1950, when Avery requested proof of loss forms be sent to the plaintiffs' attorney. This request stimulated a comprehensive investigation of the loss by the defendant, including the hiring of a consulting engineer. The formal proof of loss was received by the defendant at its head office in San Francisco on July 31, 1950. In a letter dated August 8, 1950, written by the defendant's attorney, the proofs of loss were formally rejected on the ground that the loss did not result from an insured [29] peril, and also on the ground that the proofs of loss were not made within the required sixty day period. It will be noted that the defendant never raised the question of late filing until the proofs of loss had been turned over to its legal department. Up to this time the parties had dealt with each other on the sole question of whether the loss was an insured risk.

The plaintiffs contend that the condition requiring the proofs of loss to be filed within sixty days after loss was waived by the insurer.

The principles of law involved in these opposing contentions are not in dispute. Both parties concede that a delay in the presentation to the insurer of notice and proofs of loss as required by the policy may be waived if the delay is caused by any conduct on the part of the insurer or its authorized agent; that the provision limiting the authority of an agent to waive a condition except by a writing

endorsed on the policy does not apply to stipulations to be performed after loss such as the giving of notice and the furnishing of proofs of loss; that in order to effect a waiver by an insurance company in respect of these conditions, the agent by whom such waiver is effected must be acting within the scope of his actual or apparent authority; that a denial of liability by an insurer, or his authorized officer or agent, made within the period prescribed by the policy for the submission of proofs of loss, and based on the ground that the loss is not within the risks assumed under the contract of insurance constitutes a waiver.

Defendant argues that the agent Avery had no authority to make a denial of liability upon behalf of the defendant in the first place, and that there is no evidence that the agent had sufficient knowledge of the nature of the loss and the basis of the claim upon which to make a denial. Whether a particular agent has the power to waive a condition is a question of fact. (*Westerfield et al. v. New York Life Ins. Co.*, 61 P. 667, 670). The whole course of dealing between the agent and the insured indicates that he was acting within the scope of his apparent [30] authority. The insurer permitted the agent to clothe himself with all the indicia of authority. Avery could solicit business, prepare and accept applications, execute, countersign and deliver policies, and collect premiums. A mere call on the telephone after the loss was suffered enabled Dr. Daniels to increase his coverage on the property. Apparently Avery had the power to renew policies and to make endorse-

ments extending coverage. Manifestly Mr. Avery had authority to consummate contracts of insurance for the defendant. It was a part of his duty to report all losses and claims to the Los Angeles office. The request for proof of loss forms was channeled through him. An insurance company which permits an agent to project himself before the public in this manner will not now be heard to assert that in respect to a denial of liability he was acting outside the scope of his apparent authority.

I find no greater merit in defendant's contention that the agent did not have sufficient information before him upon which to make an intelligent denial of liability. Mr. Avery's position in this litigation is a delicate one, and one would not expect to find in his testimony any direct statement clearly supporting either party's theory of the facts. If there is any doubt as to the extent or exactness of his knowledge of the nature of the loss or the claimed coverage arising from his conversations with Mr. Wing and Dr. Daniels, it is removed by his testimony concerning his informing Dr. Daniels of the similarity between the facts in this case and those in the Olds Seed Co. case, (*L.L. Olds Seed Co. v. Commercial etc. Ins. Co.*, 179 F. 2d 472). It was Avery who suggested that the claim be made on the basis of this decision. It seems clear to me that Avery was thoroughly aware of the facts relative to the damage suffered by Dr. Daniels and the nature of the claimed coverage.

Since Mr. Avery was acting within the scope of his apparent authority in making the denial of lia-

bility, the provision in the policy requiring the furnishing of the proofs of loss within sixty days was waived by the insurer. [31]

Plaintiffs are entitled to judgment as prayed for. Counsel for plaintiffs is directed to submit proposed findings and judgment to me under the rule.

Dated: This 30 day of April, 1951.

/s/ BEN HARRISON,
Judge. [32]

[Endorsed]: Filed Apr. 30, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial and was tried on December 28 and 29, 1950, and January 2 and 3, 1951, before Honorable Ben Harrison, United States District Judge. Plaintiffs appeared by their attorneys Arch E. Ekdale and John F. McCarthy, and defendant appeared by its attorneys Hindman & Davis by E. Eugene Davis. Trial by jury was waived by the parties. Evidence, both oral and documentary was received by the Court and the cause was submitted to the Court for decision. The Court, being fully advised in the premises and good cause appearing therefor now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

At all times mentioned in plaintiffs' complaint defendant Hartford Fire Insurance Company was a corporation duly licensed and [33] authorized to do an insurance business in the State of California.

II.

At all times mentioned in their complaint plaintiffs were husband and wife.

III.

At all times mentioned in their complaint plaintiffs, as joint tenants, owned the frame building situated at 3003 Palos Verdes Drive East, Palos Verdes, California, and the same was located on Lot H, Rancho Palos Verdes, Los Angeles County, California.

IV.

On December 1, 1948, defendant issued to plaintiffs upon said building the policy of insurance, a copy of which is attached to the complaint marked Exhibit "A", and in consideration thereof plaintiffs paid defendant a premium in the sum of \$120.00.

V.

On March 9, 1949, defendant by endorsement of said policy of insurance, effective as of March 4, 1949, increased the amount of insurance on said building under said policy from the sum of \$10,000.00 to the sum of \$15,000.00 and issued the written endorsement thereon, a copy of which is attached to the complaint marked Exhibit "B", and

in consideration thereof plaintiffs paid defendant an additional premium in the sum of \$54.90.

VI.

Said policy of insurance was issued for a term of three years beginning December 1, 1948, and ending on December 1, 1951, and the same was in effect at all times mentioned in the complaint and at all times since March 4, 1949, said endorsement of said policy of insurance was in full force and effect.

VII.

On or about December 19, 1949, plaintiffs suffered direct loss to said property so insured by said policy of insurance caused by perils insured by said policy of insurance. Said direct loss was [34] caused by explosion occurring in said building so insured and from hazards inherent therein and resulted in the rupture or bursting of a water pipe which was a part of the insured building and caused the reinforced concrete slab, forming a part of said building, to be deformed and cracked, and caused the door and window frames and plaster of said building to be cracked, deformed and damaged, and by reason thereof said property so insured by said policy of insurance and plaintiffs were damaged in the sum of \$14,450.00. Said rupture or bursting of said water pipe was due to an explosion which caused internal pressure in said pipe. Said loss and damage was not caused by explosion originating within steam boilers, steam pipes, steam turbines, steam engines or flywheels, and was not caused by

explosion, rupture or bursting of steam boilers, steam pipes, steam turbines, steam engines or fly-wheels. The rupture or bursting of said water pipe was the result of an explosion within the terms of said policy of insurance.

VIII.

At all times mentioned in plaintiffs' complaint Hamman & Avery, a partnership, was the duly authorized agent of defendant in connection with all matters pertaining to said policy of insurance. Said Hamman & Avery, as part of their duties as such agent of defendant, were required to report to defendant all losses and claims coming to their knowledge. Defendant authorized and permitted its said agent Hamman & Avery to conduct itself before the public in such manner, and to become clothed with such indicia of authority as to cause the public and plaintiffs reasonably to believe that said agent was the duly authorized agent of defendant in connection with all matters pertaining to said policy of insurance.

IX.

On or about December 21, 1949, plaintiffs notified defendant of said loss by reporting the same to said Hamman & Avery as agent of defendant and at said time plaintiffs inquired of said agent as to [35] whether or not any action was required of plaintiffs under said policy of insurance. Said Hamman & Avery, acting as agent for defendant at said time, informed plaintiffs that said loss was not covered by said insurance policy and that defendant was not

obligated under the terms of said policy of insurance to indemnify plaintiffs for said loss or any part thereof. Plaintiffs believed and relied upon said statement of said Hamman & Avery and believing and relying thereon plaintiffs refrained from filing proof of loss under said policy or taking any action thereon until after the expiration of more than sixty days after December 19, 1949, and plaintiffs did not discover that said loss was covered by said policy of insurance until after the expiration of more than sixty days after said loss.

X.

On July 31, 1950, plaintiffs rendered to defendant at its main office in California, written proof of loss, a copy of which is attached to plaintiffs' complaint marked Exhibit "C".

XI.

On August 8, 1950, defendant served on plaintiffs the written notice attached to plaintiffs' complaint as Exhibit "D".

XII.

Plaintiffs performed all of the terms, covenants and conditions of said policy of insurance on their part to be performed.

XIII.

Defendant has failed, neglected and refused to pay plaintiffs said sum of \$14,450.00 or any part thereof, and there is due, owing and unpaid from defendant to plaintiffs the sum of \$14,450.00. Plaintiffs are entitled to interest on said sum of \$14,450.00

at the rate of 7% per annum from August 8, 1950 to the date of judgment.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact the Court makes the following Conclusions of Law: [36]

I.

The bursting of the water pipe in the insured property was a direct loss caused by explosion within the meaning of the insurance policy sued upon.

II.

Defendant waived the filing by plaintiffs of proof of loss within sixty days after said loss.

III.

Plaintiffs are entitled to judgment against defendant in the sum of \$14,450.00 with interest thereon at the rate of 7% per annum from Oct. 29, 1950, and for their costs.

Let judgment be entered accordingly.

Dated: May 17, 1951.

/s/ BEN HARRISON,

United States District Judge. [37]

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 17, 1951.

In the United States District Court, Southern
District of California, Central Division

No. 12506-BH

ESLI H. DANIELS and HELEN J. DANIELS,
Plaintiffs,

vs.

HARTFORD FIRE INSURANCE COMPANY, a
corporation,

Defendant.

JUDGMENT

This cause came on regularly to be tried and was tried by the Court sitting without a jury on December 28 and 29, 1950, and January 2 and 3, 1951, before the Honorable Ben Harrison, United States District Judge. Plaintiffs appeared by their attorneys Arch E. Ekdale and John F. McCarthy. Defendant appeared by its attorneys Hindman & Davis by E. Eugene Davis. Trial by jury was duly waived by the parties. Evidence, both oral and documentary, was received by the Court, the cause was submitted to the Court for decision and the Court has made and filed its Findings of Fact and Conclusions of Law. The Court, being fully advised in the premises and good cause appearing therefor, it is

Ordered, Adjudged and Decreed that plaintiffs have and recover from defendant Hartford Fire Insurance Company, a corporation, the sum of \$14,450.00 with interest thereon at the rate of 7%

per [39] annum from Oct. 24th, 1950 to the date of this judgment and that plaintiffs have judgment against defendant for their costs herein incurred, taxed in the sum of \$35.16.

Done in open court this 17 day of May, 1951.

/s/ BEN HARRISON,
United States District Judge.

Judgment entered May 17, 1951. [40]

[Endorsed]: Filed May 17, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Hartford Fire Insurance Company, the above named defendant, hereby gives notice that said defendant appeals to the United States Court of Appeals for the Ninth Circuit from that certain judgment made and entered herein on the 17th day of May, 1951, and entered in Book 72, Page 498 of judgments in said Court, and from said judgment and each and every part thereof.

Dated this 14th day of June, 1951.

/s/ E. EUGENE DAVIS,
Attorney for said Defendant
and Appellant. [41]

[Endorsed]: Filed June 14, 1951.

[Title of District Court and Cause.]

APPEAL AND SUPERSEDEAS BOND

Know All Men by These Presents:

That we, Hartford Fire Insurance Company, a corporation, as principal, and Hartford Accident and Indemnity Company, a corporation organized and existing under the laws of the State of Connecticut and authorized to transact a surety business in the State of California, as surety, are held and firmly bound unto Esli H. Daniels and Helen J. Daniels, in the full sum of Twenty Thousand Dollars (\$20,000), which sum well and truly to be paid we bind ourselves, our executors, administrators, successors and assigns, jointly and severally by these presents.

The condition of the foregoing bounden obligation are such that, [42]

Whereas, in the above entitled Court the above named plaintiffs, Esli H. Daniels and Helen J. Daniels, secured a judgment against the above named Defendant, Hartford Fire Insurance Company, a corporation, in the sum of Fourteen Thousand Four Hundred Fifty Dollars (\$14,450), with interest thereon at the rate of 7% per annum from October 29, 1950, and their costs taxed in the amount of Thirty-five Dollars and Sixteen Cents (\$35.16), which judgment was given on May 17, 1951, and entered in Book 72, Page 498, of judgments in the above entitled Court, and

Whereas, the above named Defendant, Hartford Fire Insurance Company, a corporation, has ap-

pealed from said judgment to the United States Court of Appeals for the Ninth Circuit, and desires to stay and supersede the execution of said judgment.

Now, Therefore, if the said Defendant, Hartford Fire Insurance Company, shall well and truly prosecute said appeal and shall fully satisfy said judgment, together with interest, costs and damages for delay, if for any reason the appeal is dismissed or if the judgment be affirmed, and shall satisfy in full any modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, then the above bond and obligation shall be void, otherwise to remain in full force and effect.

In Witness Whereof, the above named principal has caused these presents to be executed by its attorney duly authorized, and the above named surety has caused these presents to be executed by its duly authorized attorney-in-fact, and caused its corporate seal to be affixed hereunto at Los Angeles, California, this 14th day of June, 1951.

HARTFORD FIRE INSURANCE
COMPANY, a corporation,

/s/ By E. EUGENE DAVIS,
Its Attorney.

[Seal] HARTFORD ACCIDENT AND
INDEMNITY COMPANY,

/s/ By J. K. STODDARD,
Its Attorney-in-Fact.

Examined and recommended for approval as provided in Rule 8.

/s/ E. EUGENE DAVIS

I hereby approve the foregoing this 15th day of June, 1951.

/s/ BEN HARRISON,

Judge

State of California,

County of Los Angeles—ss.

On this 14th day of June, in the year 1951, before me, Eleanor G. Davis, a Notary Public in and for said County, residing therein, duly commissioned and sworn, personally appeared J. K. Stoddard, known to me to be the Attorney-in-Fact of the Hartford Accident and Indemnity Company, the Corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the Corporation therein named, and he acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]

/s/ ELEANOR G. DAVIS,

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires May 27, 1955.

[43]

[Endorsed]: Filed June 15, 1951.

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS

Appellant will rely upon the following points in the prosecution of its appeal from the judgment entered herein:

I.

The District Court erred in finding that the property of Plaintiffs was damaged to the extent found in the judgment, or at all, by explosion as defined in the contract of insurance sued upon.

II.

The District Court erred in finding and concluding that the property of plaintiffs, as aforesaid, suffered direct loss or damage by explosion.

III.

The Court erred in concluding that Plaintiffs had [44] complied with the conditions precedent upon their part to be performed with reference to giving immediate notice of a loss and presenting Sworn Statement in Proof of Loss within sixty (60) days after the alleged loss.

IV.

The Court erred in finding that the Defendant, through duly authorized agents, waived the provisions of the contract of insurance relating to the giving of immediate notice and the presentation of sworn statement in proof of loss.

V.

The Court erred in finding and concluding that

- . Defendant was estopped to rely upon the failure of the Plaintiffs to comply with the conditions of the contract upon their part agreed to be performed with reference to giving immediate notice of loss and with reference to furnishing Sworn Statement in Proof of Loss within sixty (60) days after the happening thereof.

/s/ E. EUGENE DAVIS,

Attorney for Defendant and
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 16, 1951. [45]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 53, inclusive, contain the original Petition for Removal; Copy of all Processes, Pleadings and Orders Served Upon Defendant; Bond on Removal of Cause; Answer; Memorandum Opinion; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Appeal and Supersedeas Bond; Statement of Points; Designation of Record; Motions and Orders Extending Time, which, together with original plaintiff's Exhibit 1 to 9, inclusive, and Defendants A to G, inclusive, and copy of the reporter's transcript of proceedings on trial,

transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 10th day of August, A.D. 1951.

[Seal]

EDMUND L. SMITH,
Clerk

/s/ By THEODORE HOCKE,
Chief Deputy

In the United States District Court, Southern
District of California, Central Division

No. 12,506—BH—Civil

ESLI H. DANIELS, et al.,

Plaintiffs,

vs.

HARTFORD FIRE INSURANCE COMPANY, a
corporation,

Defendant.

Honorable Ben Harrison, Judge presiding.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Thursday, December 28, 1950

Appearances: For the Plaintiffs: Messrs. Arch E. Ekdale and John F. McCarthy. For the Defendant: Messrs. Hindman & Davis, by E. Eugene Davis, Esq. [2*]

The Court: You may call the calender.

The Clerk: Esli H. Daniels, et al., versus Hartford Fire Insurance Company, No. 12,506.

Mr. Davis: Defendant is ready.

Mr. McCarthy: Ready for the plaintiff.

The Court: Gentlemen, after reading the pre-trial statements furnished by counsel, it is apparent that the following question is involved. Of course

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

the primary question is whether the loss was covered by the policy. And the second question is whether or not there was conduct on the part of the plaintiff that waived notice; and the third one is whether or not the amount involved, and this is contingent upon whether the first two questions are answered in favor of the plaintiff, whether the some fourteen thousand odd dollars represents the loss.

Aren't those the issues, gentlemen?

Mr. Davis: I think they are, your Honor. [3]

* * * * *

ESLI H. DANIELS

called as a witness by the plaintiffs, being first sworn, testified as follows:

The Clerk: State your full name.

The Witness: E. H. Daniels.

Direct Examination

Q. (By Mr. McCarthy): Dr. Daniels, you are one of the plaintiffs in this action?

A. Yes, sir.

Q. And you are the owner of the property described in the complaint? A. Yes, sir.

Q. And that is owned entirely by yourself and your wife, the other plaintiff? A. Yes, sir.

Q. Will you describe the dwelling on that property?

A. It is our home. Do you mean by that the type of construction?

Q. Type of construction, yes.

A. It is a home built on a cement slab with a frame—wooden frame covered by redwood. For the

(Testimony of Esli H. Daniels.)

most part there is only a very small amount of brick on the outside.

It is a one-story rambling bungalow type of building. It has around 4,000 square feet in the building itself. [4]

Q. And about how many rooms?

A. Nine rooms not including the three bathrooms.

Q. And how is the house heated?

A. Heated by radiant heat.

Q. That is accomplished in what manner?

A. We have a hot water boiler that forces—that heats the water and the water in turn is forced through copper coils by a motor.

Q. And those copper coils are laid in the slab?

A. They are laid in the slab, yes.

Q. And then in parts of the house the slab is overlaid by oak flooring? A. That is correct.

Q. And is there an additional set of heating tubes in that, underneath the flooring?

A. There is beside the coils in the cement slab in those rooms that have the oak floor, there is also a layer of pipes underneath the oak flooring on top of the slab. [5]

* * * * *

Q. (By Mr. McCarthy): Now, Dr. Daniels, did you have any hot water heaters in your home?

A. Yes, sir, we have two.

Q. And where are they located in the house?

A. One hot water heater is located in the room that is occupied by the radiant heat boiler. The

(Testimony of Esli H. Daniels.)

other hot water heater is located just outside our bedroom.

Q. Which is in the opposite end of the house?

A. Yes.

Q. Which is practically at the opposite end of the house? A. Yes.

Q. Now, are those—coming first to the hot water heaters. Is that a steam heater?

A. No, it is a hot water heater.

Q. Are there any steam pipes? A. No, sir.

Q. Of any kind or character in the house?

A. No steam pipes, no, sir.

The Court: Are the two hot water heaters complementary to [7] each other? Or are they separate?

The Witness: They are separate.

The Court: Do they tie into the same system?

The Witness: No.

The Court: Pipelines or anything?

The Witness: No.

The Court: So one hot water heater is used exclusively for the radiant heating?

The Witness: No, no. The hot water heaters are not used for the radiant heating.

The Court: Neither one?

The Witness: No, sir. They are for the hot water, for personal use for our bathrooms.

The Court: How do you heat the water?

The Witness: The radiant heating has a separate boiler entirely. It has a separate boiler.

The Court: Then the hot water heater didn't have anything to do with this?

(Testimony of Esli H. Daniels.)

The Witness: The hot water heaters—the radiant heat had nothing to do with it.

Mr. McCarthy: My purpose in going into the radiant heating system is merely because it has a bearing on the cost of repair.

The radiant heat itself, as I understand it, had nothing whatever to do with this accident, to make it clear. [8]

The Court: What I am trying to get clear is, and as I understood from your statement, it is your contention that the thermostat on one of the hot water heaters failed to function and it over-heated?

Mr. McCarthy: That is correct.

The Court: And because of that pressure the pipes in the flooring were broken.

Mr. McCarthy: That is right.

The Court: Causing an explosion. The reason I asked the question whether or not these hot water heaters are connected up to the radiant heater was to make that clear. From the testimony I understand they were not connected in any way.

The Witness: That is right. They are not used for the radiant heat. The radiant heat has a separate heating system entirely.

Q. (By Mr. McCarthy): Then you have two heaters for domestic water? A. That is right.

Q. One near your bedroom and the other one in the other end of the house?

A. In the room with the boiler that is used for the radiant heat.

Q. Now with reference to these two domestic hot

(Testimony of Esli H. Daniels.)

water heaters, are they on separate systems?

A. Yes. One of them supplies the hot water for our wash [9] room, for the laundry and the bedroom and the kitchen.

Q. In that end of the house?

A. In that end of the house. The other one supplies the water for our two bedrooms and bathrooms.

The Court: Then you have a separate boiler that furnishes the hot water for the radiant heat?

The Witness: Yes, sir.

The Court: What heats the water? What do you use for fuel?

The Witness: Butane or propane. I don't know which it is.

Q. (By Mr. McCarthy): In other words, there are three heating units for hot water?

A. That is right.

Q. One for radiant heating and two for the domestic water?

A. The hot water system, yes, sir.

Q. Now, coming to the morning of Sunday, December 19. At about what time did you arise that morning?

A. I was awakened about 7:00 o'clock.

Q. And what awakened you?

A. An unusual noise in the boiler room, as we call it. It makes so much noise there anyway.

Q. And what is the approximate distance from your bedroom to that boiler room?

(Testimony of Esli H. Daniels.)

A. Oh, it would be over 50 feet. Probably 75 to 80 feet.

Q. Upon awakening what did you do? [10]

A. I ran out to this boiler room, the heater room where the radiant heat is and where this water boiler is and the water boiler was going full blast. It wasn't the radiant heat at all. The water boiler was just going full blast and it was making an unusual sound. It is hard for me to describe the sound that it was making, but it is very similar to that that you hear in your car radiator when your car is overheated. It was a type of noise like that.

The Court: And that was the hot water heater?

The Witness: Yes, the hot water heater. That was not the radiant heat.

Q. (By Mr. McCarthy): And was the gas burner burning?

A. Yes, sir; the gas burner was burning very vigorously.

Q. Then what did you do?

A. I turned off the gas immediately.

Q. Was anyone present at that time?

A. Yes. My son was there. He had arrived a few—I don't know how long before, but his bedroom is right next to that boiler room and he had heard this unusual noise and had gone out there to see what was going on and he was just, as I remember, he was just squatting down looking at the thing and wondering—he said:

“Something is wrong—what should we do,” and I stooped down and turned the gas off.

(Testimony of Esli H. Daniels.)

Q. Then what did you do? [11]

A. Then I immediately went into the bathroom and turned the hot water tap on there.

Q. And what happened?

A. Steam came out with a lot of pressure—enough pressure to blow out a little copper—well, some copper strips that are in the faucet, as I understand it, to keep the water from splashing.

That steam came out of there and then as soon as I had turned that on I went into the kitchen and turned that hot water line on also and steam came out of that and a little water.

Q. Can you compare the quantity of steam that came from the faucet in the kitchen with that which came from the one in the bathroom?

A. No, I don't recall.

Q. That is, I mean was it more or less?

A. Well, I don't believe that it had quite the pressure. It didn't blow out the little copper splash arrangement that it had in the faucet in the kitchen that it did in the bathroom.

Q. How long did steam continue to issue from the hot water faucet in the bathroom?

A. Not very long. A matter of—well, I would guess 10 minutes but I don't know. Maybe it was only two or three but it wasn't very long. Just a short time. [12]

Q. Did you then close the faucet in the bathroom?

A. No; I left the faucet open.

Q. And how long did you leave it open?

(Testimony of Esli H. Daniels.)

A. Well, I think it was probably open all day long.

Q. Did water issue from the hot water faucet in the bathroom at any time that day after you had opened it and found steam?

A. No, no water came at all.

Q. And how about the one in the kitchen?

A. No water came out of that, either.

The Court: You just turned off the gas?

The Witness: I just turned off the gas, yes.

Q. (By Mr. McCarthy): But you did open the faucets, too? A. That is correct.

Q. And you got steam out of them?

A. Yes, sir.

Q. And you left them open and at no time later that day did any water come out of either of those hot water faucets? A. That is right.

The Court: Did any water come out?

The Witness: No, except when I first turned it on there was.

The Court: But after that first pressure no water came through?

The Witness: No. [13]

The Court: Even cold water after the gas was turned off?

The Witness: No.

The Court: And you hadn't turned off the water?

The Witness: Oh, no.

Q. (By Mr. McCarthy): Now then what did you do?

A. Well, we didn't really—didn't do anything

(Testimony of Esli H. Daniels.)

until—that was on a Sunday morning and so I didn't want to disturb Kenneth Wing, who is a very good friend of mine and the architect, so I waited until about 8:00 o'clock and called him and told him that the water heater had—that the thermostat on the water heater had stuck again.

Q. It had stuck previously, had it?

A. It had stuck previously, that is right.

Q. And had been replaced? A. Yes.

Q. And that was a new thermostat?

A. It was a new hot water heater. It was approximately six weeks before that. I don't recall the exact date.

The Court: When it was stuck before did you have the same result?

The Witness: No, no. The water before—when it happened before the steam came out and then eventually hot water and then it quieted down and that was during a week day and so we got either the plumber or the Crane people. They came out and put in a new thermostat and everything was all right. [14] Then I just turned off the gas.

The Court: How did you know the thermostat wasn't working?

The Witness: Because the water was overheating.

Q. (By Mr. McCarthy): By the way, Doctor, when was this house built?

A. It was started—I believe it was started the first day of September.

Q. Of what year?

A. The first day of September of 1948.

(Testimony of Esli H. Daniels.)

Q. And when did you occupy the house first?

A. We moved in—I believe it was on the first day of July.

Q. Now, you had lived in the house then only a matter of six months or so when this occurrence happened?

A. Yes.

Q. Now, after you had called Kenneth Wing what did you do?

A. Well, I talked to him about it and he said:

“Well, don’t worry. The water will come back. It is just backed up into the line and it will come back.”

That is what I had been informed before either by Kenneth Wing or by the contractor. I don’t know who had told me before when this thing happened. They said:

“Well, now, if the water heater overheats it [15] will back up into the line and you may not get water for a little while and then the water will come back.”

Q. By “it” you mean steam would back up into the line?

A. The steam would back up into the line and that would keep the water from coming for a short while and then the water eventually would return.

Q. Did water return on the hot water faucets in the bathroom—the ones that you opened, or the kitchen, at any time until repairs were later made?

A. No, sir, not this last time that we are referring to.

Q. Yes, that is what I am referring to.

(Testimony of Esli H. Daniels.)

A. Yes.

Q. Now, following that did you hear water running in the house?

A. Well, yes, I did. The noise it makes when you—like when you turn on a faucet on the outside of the house or around the house. There was a noise.

Q. Now when did plumbers first arrive?

A. Well, that being a Sunday morning we couldn't get a plumber that day and then I called up Kenny that evening again about—I forget what time it was, but it was in the evening sometime, and told him—I said:

“Well, we still don't have any water coming out of those faucets”, and [16] “Is something wrong?” and he said: “Well, I guess there must be”, and he said, “We will send a plumber out there as soon as we can get one tomorrow.”

Q. Then did a plumber come?

A. Yes, a plumber came along about 3:00 or 4:00 o'clock Monday afternoon.

Q. And were you there?

A. I was there at the time.

Q. Your working hours, by the way, are from very early morning until shortly after noon?

A. That is right.

Q. And what did the plumber do?

A. Well, we went out to the—went out to the room where we have the water softener and it sounded like water was running in the water softener and there was also water on the floor around the water softener and before that—by the way, I

(Testimony of Esli H. Daniels.)

should maybe state that I had turned the water off, the whole system off along about when I came home from work—along about noon, I believe it was, and then you couldn't hear any noise then. But it did sound, when you turned the water on, the main valve, it sounded like there was water running in the water softener and I felt that was what happened, not knowing [17] anything about the plumbing system. It just sounded like the water was backing up into the water softener.

The plumber thought so too because he immediately tore out these water softeners. That was the first thing he did, was to dismantle them and take them out. They are very large things. He took them out and then he decided, well, that isn't the trouble because there wasn't any water there.

The Court: I have had a plumber at my house for the last two or three days so I can understand that.

Mr. McCarthy: They are independent characters.

The Witness: Then he said:

“Well, we are going to have to knock a hole in your floor. I am awfully sorry but we are going to have to knock a hole in the concrete slab and find out where this line is.”

He said:

“I think I know where the trouble is because,” as I remember he said, “I am the one that installed this line.”

So he knocked a hole just outside of the water softener room.

(Testimony of Esli H. Daniels.)

Q. (By Mr. McCarthy): Was that the same day?

A. Same afternoon, yes. And he didn't find anything. He found the pipe. He found the pipe which was intact and he said: [18]

"Well, that isn't your trouble. I will come back tomorrow."

I said:

"Well, we have got all the water shut off here now in the house. How are we going to stay here. I can't move out until you come back and turn the water on for me."

And I said:

"Can't you connect around some way so that we can get water in our back bathroom", which is our bedroom, "so that we can stay here tonight anyway," and he said:

"Well, it is getting awfully late but I will do that."

So he did then connect from the outside tap around some way—I don't know where he connected it, but he used the hose and connected it around and we were able then to get water in our back bathroom for the night.

Q. (By Mr. McCarthy): And then what was done?

A. Nothing was done that day. Nothing more was done. He went home. It was getting dark and he didn't want to work overtime, I guess.

Q. The next day what was done?

A. Well, the next day—I, of course, went to my usual [19] work and I didn't get home until about

(Testimony of Esli H. Daniels.)

noon as I recall. It may have been early afternoon or it may have been a little bit before noon.

I believe that that was the day that I came in the house and my wife said:

“Well, we have really—we have really got some trouble. Come here and look.”

And then the living room and dining room combination, which has a large window across the side going out into the patio was all steamed up. The room was just full of steam and there were quite a number of men around the house, including the contractor.

Q. And who was that?

A. That was Russell Best and several other men.

I believe one of them was the man that had been out there the night before and my son was there and I believe the engineer from Kenneth Wing’s office. I don’t know whether Kenneth was there or not. I don’t think he was. I am not sure. There were quite a few people.

Q. An engineer from Kenneth Wing’s office was whom?

A. A man they call Emmy.

Q. Mr. Reynard?

A. Yes, sir.

Q. Is he sitting in the back of the courtroom?

A. I believe he is the one. There was some engineer there, [20] but there was so much confusion I wouldn’t state definitely that it was he that was there, but I think it was.

Q. Now, had they found any break in the lines?

A. Yes. They said they had at that time and

(Testimony of Esli H. Daniels.)

they had knocked a hole through the bedroom—through my boy's bedroom floor.

Q. Could you indicate on these plans where that was found?

A. Yes, I can show the bedroom. Here is the bedroom here, this room, and here is the boiler room there.

Q. Would you mark the water—

The Court: Doesn't the plan speak for itself as to where they are located?

Mr. McCarthy: Yes.

Q. (By Mr. McCarthy): Well, can you indicate on this plan where this hole was knocked through the bedroom floor?

A. Well, approximately in this area some place—some place in this area.

The Court: You have made a circle with red pencil there.

The Witness: Yes, sir.

Mr. McCarthy: Shall we call that "A"?

Q. (By Mr. McCarthy): And how large was that hole, Doctor?

A. Well, it looked to me like a pretty good sized hole. The reason that I thought it was a pretty good sized hole was because I knew there was radiant heat in the concrete and I didn't see how they could have missed the radiant heat pipes [21] going down through there but they apparently did. So I imagine the hole was at least a foot in diameter.

Q. And when you saw the hole had any of the pipes been removed from it?

(Testimony of Esli H. Daniels.)

A. I looked down into the hole and the man that was working on the thing said that they had found the trouble and they were working on a three-quarter inch galvanized pipe—iron pipe.

Q. And that was where it broken? They told you that was where the break occurred?

A. Yes. They told me that was where the break had occurred, yes.

Q. Now, was that repaired?

A. Yes, they repaired it.

Q. And following that you were able to get hot water on the—you got water on the faucets in the bathroom and in the kitchen?

A. Yes, surely. It was repaired that day and at the same time, while these men were working that very same day—I believe it must have been—I am sure that it was, the men came out and put another thermostat on this heater.

Q. That is the hot water heater?

A. Yes, sir.

Q. Domestic hot water heater?

A. Yes. [22]

The Court: Did the third one work?

The Witness: Yes, it has worked so far. I keep my fingers crossed but they put a new safety valve on it, too, at that time.

Q. (By Mr. McCarthy): So any steam will discharge through the roof? A. That is right.

Q. Now following the making of repairs there did you notice any changes in your home?

A. Well, within a week's time the whole struc-

(Testimony of Esli H. Daniels.)

ture of the house had changed. It seemed to us—in the rooms that have the oak floors that is where the most spectacular thing happened, where the steam was coming up through the cracks, coming up through the floors, the oak floors.

The Court: You say “the steam”?

The Witness: Yes, there was steam coming up. At that time the radiant heat was on, you see, and functioning so the floors themselves were hot and there was steam coming up through there and all the oak floors, each one of them, buckled. They are constructed, I believe, maybe four inch and six inch and possibly eight inch oak flooring and each one, where the joints came together, it just buckled up all over and then there were cracks appeared in the walls and they would just happen all of a sudden. We were standing there looking at a wall and it just made a loud bang and popped and a nice big crack would appear over a doorway. [23]

And all this took place—it continued on for about a week.

The Court: May I ask Mr. Davis a question? You are not disputing the fact that there was a break in the pipe and considerable damage was done there, are you?

Mr. Davis: I am not disputing the fact there was a break in the pipe.

The Court: And that there was seepage that caused considerable damage?

Mr. Davis: No, I will concede that something has happened to that house which caused a lot of

(Testimony of Esli H. Daniels.)

damage. I saw it night before last. Whether it is faulty construction or this thing did it I don't know, but it is in bad shape. There is no question about that. The floors are buckled and the concrete floors was wavy. You couldn't use the floor for a roller rink and they showed me——

The Court: Then let us get down to what was the cause of this condition. The doctor is a layman. All he knows is that something happened to a pipe and the water got loose under his house and what caused it he doesn't know. Isn't that true, Doctor?

The Witness: Yes, I know——

The Court: All you know is that something happened.

The Witness: Something happened and it was very drastic and dramatic. [24]

Mr. Davis: Counsel has some pictures here of the situation and I think it would help us all to see them. I think your Honor would get a better idea if he saw those pictures.

Mr. McCarthy: We will be very happy to show them.

The Court: The only thing is, gentlemen, I don't know the engineer who built the house or the people who cut through the floor and found the place where the leakage occurred. I don't know whether you have that section of the pipe or not.

Q. (By Mr. McCarthy): Do you know where the pipe is, Doctor? A. No, sir, I do not.

Mr. McCarthy: Actually none of us know where

(Testimony of Esli H. Daniels.)

it is. We assume it may be down under the house. If your Honor would like to see the pipe——

The Court: I am not going under the house to find out.

Mr. McCarthy: We would have to cut a hole through the floor to see if it is there. I don't know where it is and no one I have talked to can say positively where the pipe is. They have an idea that it may have been just left under the house when they repaired the floor.

Now if your Honor thinks it would be important we can have men go in there and dig it out.

The Court: You are claiming an explosion and you have the burden of proof.

Mr. McCarthy: That is right. [25]

The Court: It seems to me that piece of pipe should have been submitted to some expert over at Caltech who could probably answer that better than anybody else—whether the break in the pipe was caused by an explosion or a defect in the pipe or what caused it.

Mr. McCarthy: We believe, your Honor, we have a complete explanation for it regardless of what the pipe shows.

The Court: I can imagine what happened to the buckled floors but that goes into the element of damages. We are first trying to determine what caused it.

Mr. McCarthy: Well, of necessity, your Honor, it is necessary for me to lay some foundation so I can ask hypothetical questions of the engineers and

(Testimony of Esli H. Daniels.)

that is why I am going into some of these facts with Dr. Daniels.

I don't know whether counsel intends to contest the amount of damage or not. His pleadings would indicate he doesn't have much quarrel with that.

Mr. Davis: No, and this is my own statement, but as your Honor gathers from the pleadings we were not notified of this until many months after. The only investigation that could be made was an examination and note the damage. We agree it would take approximately the amount of money that they claim to make a good house out of it. By admitting that I am not admitting the condition the house was in or what brought it about—that it was a broken pipe or an explosion or a boiler [26] or anything else.

Mr. McCarthy: Assuming it to be a valid claim the amount is correct.

Mr. Davis: Yes, we will not go into dollars and cents.

Mr. McCarthy: I am glad to know that.

Mr. Davis: I don't see any need of it. I saw the house myself and not even being remotely a carpenter contractor I know it is going to cost a lot of money to make a good house of it again.

The Court: The house has never been repaired?

Mr. McCarthy: No, and this happened about a year ago, Doctor?

The Witness: Yes, sir, last December.

Q. (By Mr. McCarthy): And to what extent have repairs been made?

(Testimony of Esli H. Daniels.)

A. Well, the only repairs that I have made myself—I had to level out the floors so we could walk on them without falling down and in the large hobby room I have covered that floor with a carpeting that completely covers up the cracks so it doesn't show any more.

The Court: Did this affect the walls of the house?

The Witness: Well, some of them are cracked and they have changed—they have shifted enough so that the doors won't shut. The doors that were open won't shut and the doors that were shut we couldn't open and I had to take them off and cut [27] the bottoms off the doors and so forth so they would function.

Q. (By Mr. McCarthy): But no substantial repairs have been made?

A. No. We have had no carpenters or contractors come in and do anything yet.

Q. Now, following this occurrence did you have any conversation with anyone connected with the Hartford Fire Insurance Company?

A. Yes, sir; within a week I called up my insurance agent, who is Bob Avery and——

Mr. Davis: At this point I will object to any conversations had with Bob Avery unless he establishes his authority to speak in this matter for the company.

The Court: Gentlemen, I can't hear all the evidence at once. I think you had better let me have

(Testimony of Esli H. Daniels.)

the facts and then when we get through we will try to iron them out.

Mr. Davis: It will go in over my objection.

Q. (By Mr. McCarthy): Mr. Avery is the man who signed the policy and it is admitted in the pleadings that Mr. Avery is the agent, and not a broker, but the agent of the Hartford Fire Insurance Company. The pleadings in this action admit that. They do deny, however, he had any authority to waive any of the terms of the policy and so on, but that is, I think, a question of law.

The Court: That is a question of law. [28]

Mr. McCarthy: Yes, but the pleadings admit that Avery was their agent.

Mr. Davis: That is true, we admit he had authority to execute and deliver policies.

The Court: But it is your position that he didn't have the authority to waive the provisions of the policy relative to notice?

Mr. Davis: Yes, and the authorities are too numerous to mention. The authorities are numerous either as to accepting notice or notice of loss—accept proof of loss or to waive notice or proof of loss unless he shows specific authority.

The Court: I am going to overrule the objection subject to a motion to strike. I will permit this testimony to go in so I can get the picture.

You are starting out with a house up there in the San Pedro Hills and I want to see what you have.

Q. (By Mr. McCarthy): You had a conversation with Robert Avery? A. Yes, sir.

(Testimony of Esli H. Daniels.)

Q. And about when did that occur?

A. Within the week after this had happened.

Q. And who were present?

A. It was a telephone conversation.

Q. And what was said?

A. Well, I called him up and I said: [29]

“Bob, I think that I had better increase my insurance, seeing what has happened out here. I am afraid the place is going to burn down next,” and I said—well, I started—first I started to tell him what had happened.

The Court: What did you tell him?

The Witness: I told him that the water heater had stuck and that the damage is very severe and he said: “Well, I know about that”, he said, “because Kenneth Wing had been in to see me and see whether you are covered on this”, and I said: “Well, I am not covered.” He said: “No.” He said: “No, your policy does not cover anything like that”, and then is when I said: “Well, I had better take out more insurance anyway because I am afraid the place is going to burn down next.”

Q. And did you subsequently take out—

A. Yes, sir, I doubled the policy.

Q. And did you believe what Mr. Avery told you, that it [30] was not covered by the policy?

A. Surely.

Q. And because of that you refrained from filing proof of loss under the policy? A. Yes.

Q. When did you first discover that it was covered by the policy?

(Testimony of Esli H. Daniels.)

A. Well, it was several months later. I don't know the exact date. It was quite a while later that Bob Avery or Clay Hammond, or one of the two, wrote us a note to the effect that there had been a similar case to ours and it was just a recent one and that the insured had been able to collect. And he said—I think he said: “I think you are covered.”

Q. But that was more than 60 days after the occurrence?

A. Yes, that was considerable after 60 days.

The Court: Then what did you do?

The Witness: Then I immediately got to work on the thing and called Mr. Ekdale or talked to him about it and he seemed——

The Court: Then did you file your claim, your proof of loss?

The Witness: Very shortly after that, yes, sir.

The Court: Where did you get your form for the proof of loss?

The Witness: Mr. McCarthy took care of that for me. [31]

Q. (By Mr. McCarthy): And that was filed with the Hartford Fire Insurance Company in San Francisco?

A. Yes, sir.

Mr. McCarthy: Most of the remaining facts, your Honor, are admitted in the pleadings. We attached the proof of loss to the pleadings and the insurance company admits having received it.

The Court: Any question about that?

Mr. Davis: No, we admit the receipt and the

(Testimony of Esli H. Daniels.)

date it was received. I think it was sometime in May or June.

Mr. McCarthy: Yes, the facts are all admitted in the pleadings.

Q. (By Mr. McCarthy): One other thing. Did the representatives of Hartford Fire Insurance Company have an opportunity to observe the damage to your property? A. Yes.

Mr. Davis: Just a minute. I am going to object to that. That calls for a conclusion. I think he had better tell us what and when and who saw it.

Mr. McCarthy: I propose to follow that up. That was a preliminary question.

Mr. Davis: I will withdraw the objection if it a preliminary question.

The Witness: You said did representatives from the Hartford Fire Insurance Company——

Q. (By Mr. McCarthy): Inspect the property.

A. Inspect the house?

Q. Yes.

A. A man came out there and said he was a representative of the Hartford Company, yes.

The Court: That was after you filed your proof of loss?

The Witness: Yes, sir; they were out there just about—within the week. They were out there very shortly after that.

Q. (By Mr. McCarthy): Was that before the formal proof of loss or before they were informally notified?

(No answer.)

(Testimony of Esli H. Daniels.)

Q. Do you recall anything about that?

A. I don't recall.

Q. Do you recall the exact date when they were out there?

A. No, sir, I do not. I know I was surprised that they got out there so quickly. Then I thought we were going to get some action out of the thing.

Q. And at the time the—do you recall the name of anyone who was out there?

A. No, I do not.

Q. You have met Mr. Shields?

A. Yes, sir.

Q. Did he inspect it?

A. My wife says that he did.

Q. You were not there?

A. I was not there. [33]

Q. Very well. At the time these inspections were made was the house in substantially the same condition that it was, say, two weeks after this pipe burst?

A. Yes, sir.

The Court: And in their inspection they didn't have an opportunity to see where the pipe had broken, did they?

The Witness: No, except we took them into the room and showed them where they had dug the hole.

The Court: The concrete had been replaced?

The Witness: Yes, sir.

The Court: So there was nothing for them to see except the result of the break?

The Witness: That is right.

(Testimony of Esli H. Daniels.)

Q. (By Mr. McCarthy): Did you offer to allow the floor to be opened in case they desired?

A. I told them they could do anything they wanted to. I remember there was one man that came out and was going to—said he wanted to take a lot of pictures and then he got his camera out and found something was wrong with the camera and didn't take any pictures. And there were some other men that did take some pictures, however.

Q. But you afforded the Hartford Insurance Company every opportunity—

A. Yes, sir.

Q. To inspect everything that had happened there? [34] A. Yes, sir.

Q. How soon was that break in the hole in the floor that you have indicated on the plans here filled up after the repairs?

A. I believe it was the same day.

Q. As soon as the repairs were made?

A. Yes, sir. I think they did it the same day.

Q. It was closed up? A. Yes, sir.

Q. Did you yourself see the pipe that was broken?

A. No, I didn't arrive home until after the pipe had been repaired. The plumber, I think, was just finishing the repair when I arrived home.

The Court: Do you have the plumber as a witness?

Mr. McCarthy: We hadn't planned on calling him but we can. We have an engineer who saw it.

Mr. Davis: I will say that we ran down the

(Testimony of Esli H. Daniels.)

plumber and we found out where he is and we have a subpoena for him and we are going to have him if he is available. [35]

* * * * *

Cross Examination

Q. (By Mr. Davis): And you discovered this condition of your heater on Sunday morning?

A. On Sunday morning, yes.

Q. You had your party there that night?

A. Yes, we had the party there that night.

Q. Everything went over all right and you had plenty of water? A. No water in the kitchen.

The Court: You didn't need any water at that time of the year.

The Witness: We had no water in the—no hot water in the kitchen. The reason I remember that is because my wife had to go to our bathroom in the bedroom on the other side of the house to get hot water to wash the dishes. [42]

* * * * *

Q. All of your house was served, of course, by one main water supply?

A. Yes, sir, that is correct.

Q. And that came into the house through a reduction valve, didn't it? A. Yes, sir.

Q. Which reduced the pressure to 45 pounds?

A. Something like that. [44]

* * * * *

Q. Now on this particular occasion, the night before you noticed nothing unusual—that is Saturday night. A. No, nothing unusual.

(Testimony of Esli H. Daniels.)

Q. And about 7:00 o'clock Sunday morning you heard a hissing sound like the steam hissing in a radiator that is overheated?

A. Yes, sir, something like that.

Q. Like a teakettle that is overheated—a steam hissing sound?

A. Yes.

Q. And you went out and found your boy who said he had heard the same sound—it awakened him up from sleep?

A. Yes.

Q. And you immediately turned off the gas?

A. That is right.

Q. That means turning off the main gas feed for this one [47] heater, is that right?

A. There is a little—just a little handle on the heater that you throw. It is a little red handle that they told me if it ever happened just to throw that.

Q. And that turned off the gas?

A. That turned off the gas, yes.

Q. Just on the one heater?

A. Yes, that is all.

Q. The other heaters were still going?

A. Oh, yes.

Q. And then you immediately went to the kitchen and opened the hot water tap there?

A. I went to the bathroom first.

Q. And opened the hot water cock?

A. Yes.

Q. And steam and hot water came out?

A. Yes; a small amount of hot water—a very small amount.

Q. And how long did you keep that cock open?

(Testimony of Esli H. Daniels.)

A. That was open all day long.

Q. How long did steam come out of it?

A. It was under 10 minutes, I believe. It was just a short time.

Q. And how soon after you opened that cock in the bathroom did you go to the kitchen cock?

A. Right away—just as fast as I could get there.

* * * * * [48]

Q. And when you opened up the hot water faucet in the kitchen steam and water came out?

A. Yes.

Q. And how long did steam and water come out of there? A. A very short time.

Q. About the same time as in the bathroom?

A. Yes, just a short time. [49]

* * * * *

Q. You hadn't heard any noise of running water before Monday?

A. Well, on Sunday night we had, yes. We had both commented that it sounded like one of the outside water taps was running.

Q. Sounded like a tap was open?

A. Yes. In fact I felt like—I went around to see whether it was or not.

Q. Well, you don't remember that you did go around?

A. I don't recall whether I did or not but it kind of seems like I must have because it sounded just like water was running some place in the house and we couldn't find it. [54]

* * * * *

(Testimony of Esli H. Daniels.)

Q. Now, you notified—you said you discussed this matter with Mr. Avery. You didn't call him particularly to notify him of the loss, did you?

A. Well, yes, I think I probably did. I think I did and when I started talking to him about it he said that he already knew about it.

Q. Mr. Wing's office is in the same building, I believe? A. In the same building. [59]

Q. As Avery's? A. Yes, sir.

Q. Do you have an office there? Are you interested in that? A. Oh, no.

Q. Well, what did you tell Mr. Avery had happened?

A. Well, I started to explain about the water heater and about the thermostat sticking and he said he already knew about it—knew the condition and so then I didn't go on and explain any further to him. He knew about it.

Q. And then you just forgot it until somebody read this case?

A. I asked him isn't there any chance that we are covered with our fire insurance and he said, "No, I am sorry, but it doesn't cover that", and then of course I went on to say "that is the way all insurance is, it never covers what you are supposed to have, but I had better increase my fire insurance anyway to \$30,000", and he said "Okay, we will take care of that for you."

Q. Then who was it called your attention to this water case? Mr. Avery?

(Testimony of Esli H. Daniels.)

A. I believe it was Mr. Avery. Either Mr. Avery or Mr. Wing.

Q. And after that then you did notify—had them notify the Hartford Company, correct? [60]

A. I did.

Q. Mr. McCarthy—

A. Another thing I should state, when I was talking to Mr. Avery at that time I am sure that he said that he called Los Angeles on it and that they said that we were not covered.

Q. And that was later though?

A. No, that was at that time.

Q. And then after that, after they told you about this case in the books—

A. Then I immediately got hold of Mr. Ekdale, who is a friend of mine, and talked to him about it and he said: "Well, we had better do something about it."

Q. Give them notice? A. Yes.

Q. Now, following—when was the first time that you discovered any damage to the property, to the house?

A. That was on Tuesday when things started to happen.

Q. What first happened?

A. Well, I think the first thing that I noticed was the steam coming out of the floors there in the living room, because the windows were all steamed up.

Q. Now this water pipe that broke, that is under the slab, isn't it?

(Testimony of Esli H. Daniels.)

A. That is right. It is under the—yes, it is under the slab. [61]

Q. And under the tar paper? A. Yes.

Q. And yet there was steam coming out of the floors that are laid over the secondary heating system. Are those the floors you are talking about?

A. Yes, sir.

Q. And did you open up the floors?

A. Yes, we did. We opened it up. In fact, it was either that day or the next day that Mr. Best sent a man out to open things up and let the steam out so that it would dry out faster.

Q. Did you find any water on the floors when you opened them up?

A. No, they were just damp. There was no water. Just dampness. [62]

* * * * *

Q. When did you first notice the floors buckling?

A. Just right away—within 24 hours or 48 hours.

Q. Of when?

A. Of this—of Monday. I think it was on Tuesday that we first started to notice the floors buckling because there was steam coming up through the oak floors and the oak was pretty well dried. [63]

* * * * *

Q. How long after the 18th was it before you noticed any distortion in the walls?

A. That was within a week—within a week and I would say within two or three days.

(Testimony of Esli H. Daniels.)

Q. Now previous to that you had had some cracks appear in the house, had you not?

A. Over in the garage part where the concrete is fairly thin there was a crack over in that part of the house, yes. [65]

* * * * *

Mr. Davis: I think that is all.

Redirect Examination

Q. (By Mr. McCarthy): Did you observe any distortion or cracks in the walls inside before this occurrence on December 18th? A. None. [66]

* * * * *

EMERON REYNARD

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

* * * * *

Direct Examination

Q. (By Mr. McCarthy): What is your occupation?

A. Superintendent for Mr. Wing, architect.

Q. And how long have you been so employed?

A. A little over five years.

Q. And state the nature of your duties with Mr. Wing.

A. I supervise the construction of the various projects that we have designed in our office, through the entire construction period. [68]

* * * * *

The Court: Before you get to that, did you superintend the construction of this house?

(Testimony of Emeron Reynard.)

The Witness: As far as Mr. Wing's portion was concerned, yes.

The Court: What was his portion?

The Witness: Well, I mean that we didn't maintain a [69] superintendent on the project at all times.

The Court: I know, but did you construct the entire house?

The Witness: Yes, sir.

The Court: What about the plumbing and the radiant heating? Did you have anything to do with that?

The Witness: Why, the plumbing, of course, was done as a part of the general contract and the radiant heating was done as a separate contract but it was handled through our office.

The Court: Did you handle it and supervise the construction of the flooring of this building?

The Witness: Yes, sir. [70]

* * * * *

Q. Now, did you inspect the Daniels property at any time—at or about December 18, 1950?

A. I don't know the date. If it is in reference to the time that the water pipe was broken, yes.

Q. That is it. And how did you happen to go there?

A. I was instructed by my office to go to the Daniels residence; that they were making repairs on a water line that had broken.

Q. And when you arrived there who were present?

(Testimony of Emeron Reynard.)

A. As I recall there was the plumber, who I don't know his name, and his employer, Mr. Ward, and Mr. Best.

Q. Who was the contractor?

A. The contractor. And as I recall it also Mr.—Dr. Daniels came in a few minutes later.

Q. Were you there when the opening in the floor was made?

A. Not the initial opening, no. At the time I arrived there there was an opening in the floor and it wasn't large enough for the plumber to get his tools in and they proceeded to make the opening larger for that purpose.

Q. Now, did you observe any piping in that hole before any repairs were made? A. Yes.

Q. Describe what you saw there.

A. At that point there is a "T" and the pipe at that [73] "T" was broken. There was a slip-gap between the pipe itself and the "T".

Q. Can you mark on the diagram Mr. Reynard—perhaps it would be best to use the floor plan—the location of the hole? You might use this pencil. Will you mark there the hole that you observed?

A. Substantially the same as whoever marked this.

Q. At the point "A" shown on sheet 3?

A. Yes.

Q. And will you indicate the location of the pipe?

A. Do you want me to draw it on here?

Q. Draw it right on the drawing.

(Testimony of Emeron Reynard.)

A. The pipe was going this way and here is our —there was a gap on this side of it. The pipe went on this way. This pipe went this way and this one continued on this way. The gap was right here.

Q. Indicating that the gap was on the southerly side? A. Yes.

The Court: You say a “gap”. What do you mean by that? Was the pipe completely broken in two?

The Witness: Yes; the pipe was completely broken in two.

The Court: Right up against the “T”?

The Witness: No, a slight space between the “T” and the pipe.

Q. (By Mr. McCarthy): Did it break in the threaded portion [74] of the pipe?

A. I believe it did.

Q. Was it a square break?

A. I would say so, as reasonably as could be made on a piece of pipe.

Q. And the “T” and the broken end of the pipe were separated? A. Yes.

Q. And what was the amount of the separation?

A. Well, I would say between an eighth and a quarter of an inch.

Q. And in making the repair what was done?

A. The pipe was cut back. I don't know how much. I would say approximately six to eight inches and threaded and a swing joint constructed of ells and placed back in operation again.

The Court: How was that? You say he cut back the pipe and threaded it?

(Testimony of Emerson Reynard.)

The Witness: Yes, sir.

The Court: And then did he take the thread out of the "T"?

The Witness: I presume so. I didn't see it being taken out but there is no other way it could have been done.

The Court: And then a short piece of pipe inserted there?

The Witness: Well, the pipe was brought out with an ell down and around and back up and over to the other pipe so [75] as to constitute a swing joint and the thought was at the time if there was any movement that joint would give instead of giving any trouble at this location. It was constructed of all pipe fittings.

Q. (By Mr. McCarthy): Did you observe whether or not any of that pipe shown in the circle "A" here was rigid? Was it possible to move any of those pieces of pipe? A. I don't know.

Q. You didn't get down and feel it?

A. No.

The Court: Those pipes were not buried in the concrete? They are below the concrete?

The Witness: Yes. As I recall it they were below the water-proofing membrane and either in or on top of the rock.

Mr. McCarthy: I think that is all. [76]

* * * * *

Cross Examination

By Mr. Davis:

Now, I want to ask you about this occasion when you came to the premises after there had been some

(Testimony of Emeron Reynard.)

mal-function in the hot water heater. When was the first time you heard of any mal-function [104] in the hot water heater?

A. I don't recall the date. Mr. Wing informed me that the thermostat on the water heater had gone bad and was replaced. I didn't go up to the job at that time.

Q. But you had heard of it previously—you had heard of the previous occasion? A. Yes.

Q. And you didn't go then the next time—the next time was this occasion we are talking about now? A. As far as I know, yes.

Q. And when did you first hear of that?

A. I don't recall whether I was in the office at the time or whether I was out in the field, but I was informed that the plumbers were making some changes and Mr. Wing wanted me to go up to the job and see what was going on.

Q. And when you got there who was there?

A. Mr. Best, Mr. Ward, also the plumber whose name I don't know, and myself. I don't recall anyone else.

Q. Was Dr. Daniels there?

A. I don't remember whether Mrs. Daniels was there or not. Mr. Daniels came shortly after I arrived.

Q. When you arrived had they already cut the hole?

A. They had started to work on it, yes.

Q. Did you stay in the immediate vicinity while they were cutting the hole? [105]

(Testimony of Emeron Reynard.)

A. Yes, sir.

Q. Do you know how they located the place of the leak or were you there when they located it?

A. No, I was not.

Q. When they got the hole through the concrete then what was the first thing you saw?

A. Well, the membrane was still intact at that point. I believe it was ruptured but it was there and then——

Q. Did they make a hole in the membrane?

A. Yes. And then the plumber decided the hole would have to be larger than he originally had it so he continued to break the concrete to the point where he could get his tools in to work.

Q. How large a hole did he finally have?

A. About 12 inches in diameter.

The Court: You said the membrane was ruptured?

The Witness: Yes, sir.

Mr. Davis: But it was still there.

The Court: In what way was it ruptured?

The Witness: It is just paper.

The Court: They had located, as I understand your testimony, they had located the exact place and exposed the pipe before you were there?

The Witness: Yes. They were in the process of getting to the pipe. [106]

The Court: Enlarging the hole?

The Witness: That is right.

Q. (By Mr. Davis): You don't know whether they ruptured the membrane or not?

(Testimony of Emeron Reynard.)

A. No, sir.

Q. And then they cleared away the membrane so you could look down into the hole? A. Yes.

Q. What did you observe?

A. The pipe was broken at the "T".

Q. Now which end of the "T" was it broken?

A. The run end.

Q. You call it the run end. From what you have told us I assume——

The Court: I would like to have you draw on the board a diagram of it. Just show us how it was broken.

A. Looking at it this would be the north.

The Court: Make north at the top of the board.

The Witness: The break was right here.

The Court: Draw the pipe. Suppose you had a pipe going through there, just draw a picture of it.

The Witness: This would be the run of the pipe going toward the kitchen and this is the run toward the water heater and the pipe was broken off at this point here. This would go toward the kitchen. [107]

The Court: That doesn't help me. I want a "T" where it was broken.

The Witness: The pipe was broken right here. This is the pipe going to the heater.

The Court: And where was it broken? Was it in the threads?

The Witness: Yes, sir.

Q. (By Mr. Davis): And were the two ends of the pipe in opposition?

A. It seems to me that they were slightly out of

(Testimony of Emeron Reynard.)

line—slightly out of alignment. I don't know which way at the moment.

Q. I believe you testified you didn't observe the pipe after it had been cut off. I mean you observed it as you looked down in the hole. You had better sit there so the judge can hear you. You observed the pipe as you looked down through the hole?

A. Yes, sir.

Q. Did you see it after they cut it off?

A. Yes, sir.

Q. And how large a piece did they cut off?

A. I believe it was about six or eight inches.

Q. What did they do? Just cut this piece off here?

A. Cut it off with a hack saw.

Q. And then rethreaded it? A. Yes, sir.

Q. Then you say they put in an expansion joint?

A. Swing joint.

Q. Made a "U"? A. Yes, sir.

Q. So they could get in there and work?

A. Yes, sir.

The Court: You said they put that in there in case there was any future expansion.

The Witness: That was the remark at that time, yes.

The Court: Did you see the end of the pipe when they took it off?

The Witness: Yes, sir.

The Court: What did the end look like? Was it cut right straight across?

The Witness: I am not qualified to say whether

(Testimony of Emeron Reynard.)

it was a shear or a tension break, but it was broken off.

Q. (By Mr. Davis): Was it clean?

A. Not like you would cut it with a saw or anything, no.

Q. But it was—the break was at right angles?

A. Yes, sir.

Q. That is what I am trying to say.

A. Along the angle with the thread.

Q. And there was no jaggedness to it?

A. A slight amount that you would find if a pipe were broken but I don't think there was any undue amount. [109]

The Court: In your experience have you seen broken threads before?

The Witness: I have seen broken threads, yes.

The Court: Did that appear to you to be an ordinary break that you would find in threads?

The Witness: Yes, sir.

The Court: I have a sprinkling system that I have been playing with a long time, so I have learned a lot about these "T's" and breaks. I am just trying to show my knowledge of plumbing by working with a sprinkler system. I am trying to get it to hit all parts of my lawn.

Q. (By Mr. Davis): I believe you said that was the piece they cut off—it was about six or eight inches long?

A. Yes, about six or eight inches long.

Q. Maybe that accounts why nobody ever saw it after that. I had a picture in my mind that it

(Testimony of Emeron Reynard.)

might have been a much larger piece of pipe.

The Court: They had quite a time getting the end out of it.

Mr. Davis: We have subpoenaed the plumber—that is if we can get him. These technicians are mighty ticklish and you have to catch them on the run. I think we will find out more about it when he gets here. I imagine they have instruments to get ends out of the pipe. You should know something about that, too. [110]

The Witness: I have got a chisel just the size of the pipe that I drive in there and put the wrench on it and just twist it out.

Mr. Ekdale: That is not good practice. You should throw it away.

Q. (By Mr. Davis): Now, you were there and I understand that some people came about that time to inspect the hot water tank? A. Yes, sir.

Q. Who were they?

A. Two gentlemen, as I recall. One of them I believe was named Quinn from, I believe it is from the Crane Company in Los Angeles, and I think the other gentleman was Mr. Chosen (phonetic) from the Crane Company in Long Beach. [111]

* * * * *

Q. (By Mr. Davis): Did your specifications have anything to do with the specifying of a pressure reducer? A. Yes, sir. [112]

* * * * *

Q. (By Mr. Davis): Will that specification in itself indicate the reduction or the amount of

(Testimony of Emeron Reynard.)

pressure? A. Yes, sir.

Q. Do you know whether or not that reducer pressure valve was installed? A. I do. [113]

* * * * *

Q. But you do know that that regulator was installed there? A. Yes, sir. [114]

* * * * *

SIMON PERLITER

called as a witness by the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Simon Perliter.

Direct Examination

Q. (By Mr. McCarthy): What is your occupation, Mr. Perliter?

A. I am a consulting engineer.

Q. And any specialty in engineering?

A. Yes. My specialty is hydraulic and structural engineering. [121]

* * * * *

Q. Now, Mr. Perliter, did you ever inspect the home of Dr. Daniels?

A. Yes. I inspected the home of Dr. Daniels for the first time—sometime prior to March 18, 1950.

Q. And will you tell us what you observed there on that occasion?

A. On the first occasion that I inspected the home I made a rather casual inspection and noticed numerous deformations, particularly at the doorways. I noticed deformation of the floors, the slab throughout the entire house.

(Testimony of Simon Perliter.)

I noticed the heaving of the hardwood floors in the dining room and in the living room.

I noticed numerous plaster cracks throughout the house.

I made also a casual inspection of the outside of the house primarily to see what had happened on the outside.

I also attempted at that time to close some of these doors, which I couldn't. I also walked into the kitchen and I noticed the drainboard—I took a glass of water and poured it at one end of the drainboard and the water flowed toward the wall rather than in the opposite direction, which is common practice in construction of that type.

Q. Then when did you next inspect the property?

A. On the morning of March 18, I believe it was a Saturday, 1950. My partner and I brought an instrument, a level along with a view of running levels throughout the house to determine the amount of deformation that had taken place.

Q. Did you make a drawing showing those various levels? [126] A. Yes, sir.

Q. Is this the drawing?

A. This is the drawing—this is a print of the original drawing. I have the original in my brief case. This is a print of the original—of the original survey.

Q. And does this truly record the elevations at various points in the house with reference to an arbitrary mark which you used?

(Testimony of Simon Perliter.)

A. Yes, as close as you can run a level survey with a regular surveyor's instrument.

Mr. McCarthy: I offer in evidence this as our next exhibit.

The Court: Any objection?

Mr. Davis: No objection.

The Court: Admitted.

The Clerk: Plaintiffs' Exhibit 2 in evidence.

(The document referred to was marked Plaintiffs' Exhibit 2 and received in evidence.)

Q. (By Mr. McCarthy): Now, Mr. Perliter, does this show the amount of deformation of the various floors in this building?

A. It shows the amount of deformation of the various floors of that building as of March 18, 1950.

* * * * * [127]

Mr. Davis: I will concede that his figure to put that place back in good condition from the way it is now would cost approximately his figure.

Mr. McCarthy: Which is \$14,450. [128]

* * * * *

The Court: In other words, you are not making any admission of liability but we don't have to spend time now on that element?

Mr. Davis: Not on the dollars and cents.

Q. (By Mr. McCarthy): Now, Mr. Perliter, in the light of your own inspection and observation of this building, and assuming the facts which I will here relate to you, I am going to ask you for your opinion—

(Testimony of Simon Perliter.)

The Court: Has the witness been in court during all the testimony?

Mr. McCarthy: I don't think he heard the first of Dr. Daniels' testimony.

Q. (By Mr. McCarthy): At what stage did you come into the courtroom, Mr. Perliter? [129]

A. I came in when, I believe, Dr. Daniels was just getting on the stand or shortly thereafter.

Q. Then you heard the bulk of his testimony?

A. Yes, I heard the bulk of his testimony.

Q. Well, assuming then the truth of the facts stated in Dr. Daniels' testimony and also your own observation of the building, do you have an opinion as to the time at which this cold water pipe broke?

A. Yes. I would say that it probably broke immediately after the Doctor turned on the hot water faucet in the bathroom.

Q. And will you state your reason for that opinion?

A. Yes. When he opened the hot water tap, as he described, it came out with considerable force and turned into steam. The reason for that is this. I believe most of us have been up in the mountains at some relatively high elevation and you have always found it difficult to boil water or, rather, you found it easy to boil it. It will boil at a lower temperature than it does at the sea shore and that is due to the fact that the higher we go in the air the lower the atmospheric pressure. At the sea shore the atmospheric pressure is 14.7 pounds per square inch

(Testimony of Simon Perliter.)

of surface. There are 14.7 pounds of air pressure bearing down.

The Court: And that is what holds us onto the earth.

The Witness: The force of gravity holds us down to the [130] earth because that pressure is exercised in all directions. If it wasn't you would burst. If you want me to I can tell you a story about that.

The Court: And I can tell you a story also when you get through.

The Witness: When he opened that faucet the pressure inside of the faucet and in the tank was quite high. It had to be high because this heat had been continuously boiling up and the higher the pressure the higher the boiling point. That is one of the basic concepts of physics.

I remember in high school I learned that.

The minute he opened that faucet he released pressure and by releasing pressure that water that was immediately behind the faucet burst out. The pressure was released and it turned into steam.

Now, as I gather from Dr. Daniels that faucet was left open. He didn't shut it. That lowering of the pressure immediately transferred itself all the way through the piping system, the hot water piping system on to the tank. I don't know if your Honor is familiar how a hot water tank is constructed and if you wish I will draw one on the board.

The Court: I want to know how this one was drawn.

(Testimony of Simon Perliter.)

The Witness: This is common practice.

The Court: I am not interested in common practice. Do you know anything about this hot water heater? [131]

The Witness: No, I wasn't inside of it so I couldn't tell you that but the cold water tap of a hot water boiler comes in through the top and goes down to the bottom of the boiler to within about a foot of the bottom.

The hot water tap of a boiler comes out of the top. The reason for that is this. If your cold water line did not go down toward the bottom you would *by* by-passing the heating element at the bottom, so that your cold water would take the least path of resistance and go out the hot water side immediately and they would get the hot water at the bottom and cold water at the top and at the bottom is where the heating element is located.

Now, when this thermostat failed to operate the gas continued to heat this water. The pressure kept building up in this tank and some of that formed into small vapor bubbles and these vapor bubbles found their way both into the hot water line and also partially into the cold water line and when Dr. Daniels opened that faucet and reduced the pressure, that pressure immediately was transmitted upstream from the faucet toward the hot water tank, up through the cold water line and finally found a way of getting out by exploding.

Now, I will explain why that exploded. It is based upon a common concept of what is called "water hammer." Water hammer can occur under various

(Testimony of Simon Perliter.)

conditions. The common concept is when we close a valve very suddenly what you do is you are shutting off the flow of water. You have energy in this water that is traveling in the line and when you close off a valve suddenly that energy has to be released in some manner or form and it is released in the form of a wave. That wave travels at a speed equivalent to four times the speed of sound in air. In water it is equal to 4800 feet per second. Or if you want to convert it into miles per hour, 3,300 miles per hour. That wave travels that fast.

And when that wave travels with that speed it acts as a battering ram and anything that gets in its way will feel the effect of that force and those stresses are theoretically—they are infinite stresses.

I will go a little farther. In large water supply systems where you are pumping from this level up to a tank at a higher level to serve an area at a higher level, we install what is known as control valves. There are various types on the market, depending upon price and their ability to do a job.

A control valve operates in this manner. When we are ready to stop pumping—in other words when the reservoir that we are pumping to reaches a certain level there is a float switch. That float switch sends an impulse through a telephone wire to the control valve and the minute that impulse is received by the control valve it starts to shut the control valve off and not the pump. The control valve starts to close. The pump is still operating. The reason for that is you want [133] the energy that is imparted by the pump to keep that reaction, that

(Testimony of Simon Perliter.)

force that would come back otherwise to balance that force and when these valves are about 85 per cent closed it automatically trips a little lever that shuts off the pump.

The same thing happens when you are starting up a pump. It is to prevent cavitation. The pump is started up first and the valve starts to open up very gradually so that you don't have that full head and all that energy working against the pump and the impellers.

Now in this particular case the steam acted almost in a similar manner. In other words, these vapor bubbles would have gotten into this pipe and when this faucet was opened that force was transmitted through the tank into this pipe, which already had these vapor bubbles, and it acted in a similar manner that I have just explained for water hammer and when it got to this it had to take a right angle turn and no doubt some of you gentlemen have tried to take a right angle turn around the corner with your automobile and if you go too fast you know what the results are.

What happened here is it had to go around that bend. Water being incompressible it couldn't get there—it couldn't go anywhere because the water was compressed so it hit that "T" and from all the descriptions that I have had of the "T" and how it ruptured or rather the description of the cut, [134] it is my conclusion that it was a sheer rupture rather than a tensile rupture.

I might explain that. A "tensile rupture"—if you took a bar in between my hands and if I were strong

(Testimony of Simon Perliter.)

enough to pull that apart what happens is the bar keeps stretching and then at the point of break she necks out and then she snaps, so whenever you see a tensile break you will always notice the necking at that point of rupture. In a sheer break you don't get the necking. It is just a break right across. And analyzing this from the point of mechanics, the forces that might have acted on this thing, I would say that it was a sheer break, especially in light of the description given by Mr.—I don't recall his name——

Q. Reynard.

A. Reynard. Now here is another thing that might be of interest to the court.

Had this break occurred prior to the time Dr. Daniels turned on that faucet, regardless of how much heat had been going into that system, there wouldn't have been any steam coming out of there. There wouldn't have been an explosive violence because that force would have had—there is a force exerted by this heat which would have been relieved in a similar fashion as a relief valve through this cold water tap.

Now, furthermore, based upon Dr. Daniels' explanation [135] of what he saw after he opened up that faucet, he said that there was no more water, hot water, coming out of that nor cold water.

Mr. Davis: I think the witness misunderstood the doctor's testimony.

The Witness: He left that faucet open for a long time. How long I don't know. But I believe that he said that at the end of a few minutes there

(Testimony of Simon Perliter.)

was no more water coming out of that hot water faucet.

What happened, first, part of the water was draining through the faucet and the other part of it went out through the rupture in the pipe. Had the rupture not occurred, had the explosion in that pipe not occurred then water would have flowed through the boiler and back through the hot water system.

* * * * *

Q. (By Mr. McCarthy): What, Mr. Perliter, is the weakest point of a pipe which is threaded and turned into a "T" such as the one here involved?

A. The weakest point usually is at the threaded section. Now in the design of rods, brace rods—your Honor probably has seen brace rods in steel buildings, when you compute the stress in a brace rod they compute it at the minimum diameter which is the threaded portion and when you use small rods, and it is economical to use a small rod, you still compute only the stress occurring at the threaded portion.

In large diameter rods such as are used in back stays of suspension bridges they usually up-set those rods. By "up-setting" I mean——

The Court: In other words, what you are trying to tell me that where the threads are is the weakest point of the pipe?

The Witness: Yes.

The Court: It doesn't take an expert to tell us that. That is a matter of common knowledge.

Mr. McCarthy: That is all. * * * * *

(Testimony of Simon Perliter.)

Cross Examination

Q. (By Mr. Davis): Now, in this particular case, from where does that [137] energy come? What is its source? A. Heat.

Q. And, in other words, it was the boiling of the water in the tank that created the pressure that in your opinion broke the pipe?

A. No, not the boiling. The water was not boiling in the boiler. It was under too much pressure to boil.

Q. I mean the steaming or whatever it is.

A. In other words, the way water would normally form inside that tank and in adjoining pipes would be in the form of vapor bubbles. They are the making of the steam and the minute that you reduce the pressure it is these little minute vapor bubbles that break into steam.

Q. Where did this force come from that broke this pipe?

A. It came from, first, the bursting or the turning of the hot water into steam and, secondly, the transmission of that force into the cold pipe—in the cold water pipe, acting as a ram against the incompressible water in the pipe. [138]

* * * * *

Q. Now tell us about that pressure relief valve.

A. If I remember correctly, it was a No. 2 Bailey pressure relief valve.

Q. Could you tell what reduction it made in the outside pressure?

A. I believe it reduces it down to about 40

(Testimony of Simon Perliter.)

pounds from whatever the street side of it was—what we call the street side pressures, were.

Q. I don't understand your testimony to be that the street side pressure had anything to do with this result.

A. No, it doesn't. I made a statement that it was reduced from the street side pressure, whatever that was. I have been told that it is about 140 pounds. It was reduced through this pressure reducing valve to approximately 40 pounds. That is a normal working pressure for house service.

Q. That means no greater pressure can get through than 40 pounds, isn't that correct?

A. That is right, provided, of course—when you say “greater pressure,” at that particular point the pressure will continue at that 40 pounds under static conditions, but as you open the faucet that pressure reduces considerably by virtue of losses due to friction and due to bends and due to loss through valves.

* * * * * [140]

The Court: Then, as I understand your testimony, the break in that pipe was caused by the excessive pressure.

The Witness: A wave of pressure, yes, sir. [143]

* * * * *

Q. Eight or 10 or 12? We can determine that from our blueprints anyway. All right, now, as I get your explanation, this water was heated? [148]

A. Yes, sir.

Q. But as long as it was compressed there was no boiling, is that correct?

(Testimony of Simon Perliter.)

A. As long as it was under pressure.

Q. There was no boiling or steaming?

A. That is right.

Q. And what kept it under pressure?

A. Well, the heat kept it under pressure. In other words, the continuous heating.

Q. Kept it under pressure and that was all that kept it under pressure?

A. No, no, there is one other thing that kept it under pressure and that is the pressure of the system—the cold water system.

Q. That is the cold water system, the 45 pounds of cold water coming in there?

A. Whatever it is, 40 or 45 pounds.

Q. That kept the pressure but if the thermostat wasn't working and the water was boiling——

A. The water was not boiling.

Q. I mean the water was heating.

A. Heating.

Q. But because of the pressure it was not boiling or steaming, is that right? A. That is right.

Q. But it keeps right on expanding, doesn't it?

A. That is right.

Q. Then you say this hot water tap was opened?

A. Well, that is what Dr. Daniels said.

Q. We are assuming that. A. Yes.

Q. And that and steam and some hot water came out of these two taps? A. Yes.

Q. They were left open. Now, I am getting to the point where I am confused. Then this energy was created. How and where was it created?

(Testimony of Simon Perliter.)

A. The minute you open that hot water faucet you automatically reduce the pressure in that whole system in there. It was under tremendous pressure. How much, I couldn't say nor can anyone else without having a gauge on the steam gauge. So you immediately release that pressure in that system and when you release that pressure that water turned—that is, a good part of this water turned into steam and the violence that has been described here blew that thing off. [150]

* * * * *

Q. (By Mr. Davis): Did Dr. Daniels tell you that he had turned the gas off before he opened the hot water cock?

A. From the testimony here yesterday I understood that he turned the gas off first and then he proceeded into the bathroom and opened up the hot water faucet.

Q. And how long after he opened the hot water faucet, according to your theory, was it before the break occurred?

A. That would almost be immediately after he would open the faucet. The break would occur immediately after that. [166]

* * * * *

Q. And is what you have been talking about here—would you describe that as a water hammer?

A. That is commonly known and it is a scientific fact that it is water hammer.

Q. And your water hammer occurs in your larger pipes [168] and where you have great pressures, isn't that a fact?

(Testimony of Simon Perliter.)

A. Well, that is a fact and it is also a fact that it can occur in small pipes. I mean there is no line of demarcation where it might occur. It can occur in small pipes and it can occur in large pipes.

Q. What is the probability of it occurring in a small pipe, a three-quarter inch pipe, as compared to a 12 inch pipe?

A. The occurrence of water hammer in small pipes is just as probable as in large pipes.

Q. But the force, the energy that will be exerted, will be very much less, will it not?

A. That depends where the energy is coming from. The energy that is imparted in a small pipe can be just as much as the energy imparted in a large pipe.

Q. Where does that—in this instance what is your theory as to where that energy came from?

A. In order to answer that question I would like to go back a little bit.

Q. Can't you answer it first and then explain it? Where did that energy come from?

A. Well, I still would like, your Honor, to explain. [169]

* * * * *

The Witness: The energy came from the violent explosion of the hot water, the explosion of the steam.

Q. (By Mr. Davis): In the tank?

A. Might have been in the tank, might have been partially in the pipe.

Q. And when you have a force applied—any

(Testimony of Simon Perliter.)

force, but particularly a hydraulic force—the appliance is going to give at its weakest point, isn't it?

A. That is usually the case and that is what I think happened here. The weakest point I figure, based upon the testimony of the doctor, it broke at the "T" and that was the weakest point. [170]

* * * * *

Q. But as the energy was being exerted it would go this way, this way, this way and every way, wouldn't it?

A. The energy imparted under water hammer of this type is momentary. It is like an earthquake. It is sudden. [173]

* * * * *

The Court: There is an expression used in the insurance policy of "direct loss." What is your explanation of all these deformities that have developed in that place? What [180] caused them?

The Witness: My explanation of these deformities is explained in the manner that after this pipe exploded the system was still under the street pressure so the water just poured out under the foundation and as a result of all of that large amount of water that poured under that foundation it deformed the floor and in the deformation of the floor it deformed other structures immediately above the floor. [181]

* * * * *

Q. (By Mr. Davis): Now your conclusion is that this water came from this broken pipe and that is what caused all the damage that you observed there?

(Testimony of Simon Perliter.)

A. All the damage that I observed was caused by the amount of water that poured under the foundation after the explosion occurred.

* * * * *

Q. Now, did this—what happened to cause those walls, those bearing walls, to distort? What did the water do to them?

A. I believe that the water that got under the house as a result of this explosion saturated the soil underneath and also it is quite possible that the hydrostatic pressure developed in that area could have done the damage as well. And when this black adobe is saturated it has a tendency to swell and with that large amount of water that was under [187] there it could swell anywhere from 25 to 40 per cent of its original volume. That is one of the characteristics of black adobe. [188]

* * * * *

Redirect Examination

Q. (By Mr. McCarthy): Now on the subject of water hammer, Mr. Perliter. Does water hammer—when water hammer is created is that in excess of ordinary working pressures?

A. Considerably in excess.

Q. And on the subject of a factor of safety for water hammer, is there any reason why a factor of safety has not been set up as far as you know?

A. They don't set up specifically a factor of safety for water hammer. They set up a factor of safety for things that might occur. It might be caused by anything that might occur. They don't

(Testimony of Simon Perliter.)

set it up specifically for water hammer. [197]

Q. Well, what I am getting at is, does water hammer vary according to the manner of its creation? That is, the pressure created by the manner of its creation, the respective pressures involved, and so on.

A. Yes. Water hammer will be of one intensity due to a sudden closing of a valve, and it is another and much greater intensity when steam explodes.

Q. And is the introduction of steam into water one of the well-known and commonly recognized causes of water hammer?

A. When the steam explodes that is what happens.

Q. Am I correct in saying that the introduction of steam into water is one of the commonly recognized causes of water hammer? A. Yes. [198]

* * * * *

Q. Now in your opinion, Mr. Perliter, was the break in this pipe caused by internal pressure?

A. That is the only way the break could have occurred, is due to internal pressure. The internal pressure was there and that is what caused the break. [199]

* * * * *

Q. Mr. Perliter, is there any example in nature of the formation of steam by reason of the release of pressure upon it?

The Court: I don't understand that question.

Mr. McCarthy: Will you read the question?

(Question read.)

(Testimony of Simon Perliter.)

Q. (By Mr. McCarthy): Upon superheated water?

A. Yes. I think I can illustrate that very well. I don't know if you have ever been up in Yellowstone National Park. I have and you probably have and if you haven't you have all heard of Old Faithful. There is a perfect example of the same thing that happened here.

Now here is the principle of a geyser. You have a long tube and underneath this tube is a big cavern. The cavern has water in it. The heat applied to the water at the bottom is due to the earth's heat which we all know exists. It continues to heat the water and as the temperature rises the [200] pressure rises. That is a common high school lesson in physics. The pressure continues to rise to such an extent—to such a point where the long column from which the geyser discharges, it exceeds that pressure that is holding it down. It is like a cork, and when it exceeds that and the pressure is released, the minute the pressure is released these steam bubbles explode with great violence and then the whole thing just rises up and continues to operate until the whole thing is back in equilibrium and there is a column of water back in this tube and then the heat continues to operate again and you get that thing occurring over and over again. [201]

* * * * *

Recross Examination

The Court: In other words, the water didn't have to come through the water pipe?

The Witness: That is right, but the house is con-

(Testimony of Simon Perliter.)

structed in such a manner that the rain drains away from it. [202]

* * * * *

KENNETH S. WING

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Kenneth S. Wing.

Direct Examination

Q. (By Mr. McCarthy): What is your occupation, Mr. Wing? A. Architect.

Q. And how long have you practiced your profession?

A. I have been certificated since 1929 and have practiced since 1930.

Q. And that has been continuous practice?

A. Yes. [203]

* * * * *

Q. All right. Now describe the manner in which that—the foundations and the slab floor were constructed. Just what they did.

A. Well, all continuous walls were—both exterior and interior, were poured and then the grade was determined and the crushed rock was placed underneath it and then a building paper was laid over it—not as a membrane—it was not sealed in any manner. We don't wish it to be that way. That wasn't the intention. It was to keep the concrete from becoming part of the rock which was beneath it so it would create a void underneath the floor to

(Testimony of Kenneth S. Wing.)

protect the normal amount of water that might possibly come from normal soil conditions.

Q. All right. Then describe the manner in which the sequence of pouring of concrete into the various parts of the foundation and slab.

A. Well, as I said, the exterior and interior continuous foundations were all poured and then the rock was placed and [207] then the paper placed on top of that and then the slab was poured over everything, which makes for continuity of the building.

Q. Then as to the various walls, both exterior and interior, on what were they placed?

A. Well, they began—there are bolts located so—they are spotted and the plate then is located where they belong, naturally right over the foundation, the bearing foundation.

Q. And does the slab floor extend under the plate? A. Yes.

Q. So that you have in a sequence going down the plate, part of the slab and then the foundation footings?

A. Yes. I should like to call your attention that there is a cold joint between the foundation and the slab.

Q. By a "cold" joint what do you mean?

A. I mean there is not perfect adhesion. It takes vertical loads but doesn't contemplate any other direction. [208]

* * * * *

(Testimony of Kenneth S. Wing.)

Q. Were there any steam boilers or steam pipes in this house at all?

A. Not as such, no. It was water. It is heating by radiation from water circulating—circulating water. [211]

* * * * *

Q. That is what I was getting at—any steam that formed in the hot water heater could back up into the cold water line.

A. It could only go to a point because of the fact there is a tremendous pressure coming down from the hill and there is a pressure reduction valve outside of the driveway.

Q. But it could go up to the pressure reduction valve? A. Yes. [214]

* * * * *

Q. (By Mr. McCarthy): Now, on or about December 18, 1949 did you receive a call from Dr. Daniel? A. Yes, I did.

Q. Regarding his hot water heater?

A. Yes.

Q. Tell us about that. What was done? Was that a telephone call?

A. Yes, it was a telephone call.

* * * * *

Q. (By Mr. McCarthy): Did you inspect the Daniels home within a day or two after receiving that telephone call?

A. After the break in the line was completed. I was there after that. I saw the damage done to the

(Testimony of Kenneth S. Wing.)

building and I am familiar with the immediate damage.

Q. You didn't see it up until the time they made the repairs?

A. No. Mr. Reynard went over. He is our superintendent and he immediately went over. [215]

* * * * *

Q. Did you observe the damage done to the house? A. Yes, I did.

Q. Will you describe that?

A. Well, apparently the floor—the most obvious thing of course is the surface and then working back toward the floor, it was distorted and sprung out of shape and the concrete floor in their rumpus or hobby room was considerably arched at that time and the doors did not work indicating a rise at the particular point where the distortion was obvious. Everything so far as the horizontal plane was concerned had apparently risen.

Q. And as to the foundations or fittings, did they appear to have risen? A. No, they did not.

* * * * * [216]

Q. Now following the occurrence of this break in the line, did you have any conversation with Mr. Robert Avery?

A. Following the break of the line?

Q. Yes.

A. Yes, I did, within a very few days after that. I discussed it with him.

Q. And who is Mr. Robert Avery?

A. He is one of the partners—in fact, I dis-

(Testimony of Kenneth S. Wing.)

cussed it with both Hammond and Avery who are the firm of Hammond & Avery Insurance Agents, with whom the Doctor placed the policy.

Q. And who were present when you had this conversation with Mr. Avery?

A. Mr. Hammond and Mr. Avery. [217]

Q. Both of them were there? A. Yes, sir.

Q. And what was said?

Mr. Davis: Again I make my original objection that conversation had with these gentlemen would not be binding upon the company unless the agent's authority has first been shown.

The Court: That is one of the questions we have to settle here.

Mr. McCarthy: Yes, your Honor, that is right.

The Court: It will be admitted subject to objection to strike.

Mr. McCarthy: Thank you, your Honor.

Mr. Davis: Same objection I made yesterday, that your Honor reserved ruling on.

Q. (By Mr. McCarthy): Will you state that conversation?

A. I asked them if their comprehensive clause, as I understood it, would not cover this and they said that they would check and they talked, as I remember it, with the Los Angeles office.

Mr. Davis: I object to that.

The Court: What did they tell you?

The Witness: They said that it did not.

The Court: Did they say they had checked with Los Angeles?

(Testimony of Kenneth S. Wing.)

The Witness: Yes, sir. [218]

Q. (By Mr. McCarthy): Now, did you tell them what happened? A. Oh, yes.

Q. Describe what you told them.

A. Well, I told them that the water line had broken under the building and caused a considerable amount of water to go underneath the building, necessarily swelling the adobe, which is common procedure.

The Court: Did you tell what caused the break in the line?

The Witness: Yes, I told them, which I felt at that time, that it was the thermostat on the water heater. I think that was the beginning point of all of it.

Q. (By Mr. McCarthy): You told them about the failure of the thermostat? A. Yes.

Q. Did you say anything about the formation of steam?

A. No, I did not. I did not get into any technical discussion with them to that extent. I told them the pressure was built up due to the fact that the thermostat didn't release. [219]

* * * * *

HELEN J. DANIELS

called as a witness by the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Mrs. E. H. Daniels.

The Clerk: What is your first name?

The Witness: Helen J. Daniels. [241]

(Testimony of Helen J. Daniels.)

Direct Examination

Q. (By Mr. McCarthy): Mrs. Daniels, you are one of the plaintiffs in this action? A. I am.

Q. And one of the owners of the house that was damaged by the breaking of this water pipe?

A. Yes.

Q. Mrs. Daniels, will you tell us what occurred on the morning of December 18, 1949 with reference to the overheating of this hot water heater?

A. I was sleeping at the time but I woke up hearing my husband and son out in the kitchen and when I entered the room I saw this steam coming from the faucet.

Q. And then what did you see after that?

A. Well, the steam went away. It just lasted for a few seconds or minutes—just a short time after I reached there.

Q. And did you see whether or not that hot water faucet in the kitchen was closed after the steam had issued from it?

A. We left the faucet open all day.

The Court: Was the water running?

The Witness: No, there was no water in the hot water faucet.

The Court: How about the cold water faucet?

The Witness: There was a very slight amount of water.

Q. (By Mr. McCarthy): That was after the steam had issued out?

A. That was after the steam came, yes.

(Testimony of Helen J. Daniels.)

Q. How long did that reduced volume of cold water out of the cold water faucet continue?

A. It continued until it was repaired.

Q. Now were you there when the faucet in the kitchen was first opened?

A. No, I wasn't there when it was first opened.

Q. You arrived there too late to see that?

A. I arrived—there was a commotion out in the kitchen and I knew something was wrong.

Q. Then did you do anything? Did you observe anything further during that day?

A. No. The only reason I remember it was that we were entertaining the nurses from the hospital that night and having to use water during the day I was drawing from the cold water faucet. That is the reason I remember that. And I got so very little water and it was quite a process to try to entertain 20 nurses. So finally we decided that we would go to the other bathroom and get kettles of hot water which made our preparing for the luncheon a little more simple.

Q. Did you have hot water?

A. Had hot water in the other bathroom which is heated [243] in another hot water heater.

Q. Now at any particular time during that day, after you observed steam issuing from the hot water faucet, did you notice water appeared to be running in the house?

A. We did. When we went to bed at night—of course we were busy preparing for this dinner during the day.

(Testimony of Helen J. Daniels.)

Q. And you paid no attention to it?

A. Paid no attention but at night when the house was quiet it did sound like there was water running some place.

Q. Now on the next day what if anything happened?

A. Nothing particular happened. The plumber hadn't arrived by the time I left the house. I left the house early in the morning to help my neighbor prepare a luncheon and I was gone all day.

Q. And when you returned was the plumber there?

A. No, the plumber had left.

Q. Then the following day, Tuesday, tell us what occurred?

A. Well, the plumber came in the morning some time and I didn't pay much attention to what was happening because the plumber had called and it was his responsibility. I thought he would just repair it and everything was all right, and he did, but of course at that time we didn't realize the extent of the damage.

Q. Now on that—on Tuesday who all do you remember was [244] in the house in connection with this?

A. I can't remember everybody. There seemed to be a lot around there. There were probably six men.

Q. And did you observe what was done in the way of making repairs?

A. I knew what they were doing. They were

(Testimony of Helen J. Daniels.)

working in Richard's room. I had to awaken him so they could go into that room.

Q. Did you see the nature of the repairs that were being made?

A. No, I wasn't paying any attention.

Q. Did you see the nature of the break?

A. No, I did not.

The Court: You didn't pay any attention when they were cutting a hole through your floor?

The Witness: There were about a half dozen men there. Mr. Quinn, I believe, was one of them, and several plumbers and there really wasn't room for me.

Q. (Mr. McCarthy): You didn't like the idea of the break?

A. I didn't like the idea. There was cement splashing all over the bedroom and there wasn't very much room for me.

Q. Well then, when did you first observe any deformation of either the floors or the walls of this house?

A. Well, I would say by Monday evening, the following [245] day, that we began to notice this, first in the hardwood floors. They began to buckle slightly.

Q. Did you see any steam in the vicinity of those?

A. Just where the hardwood floors and the radiant heat was. We left the radiant heat on all the time.

Q. And just tell us what you saw there.

(Testimony of Helen J. Daniels.)

A. Well,—you mean on the following day—what the damage was?

Q. Yes. Just describe the damage.

A. As the boards began to buckle up—it was so uncanny that we didn't—we were startled—that is all. That is one of those things we had never seen or heard of having happened. This plate glass window and the radiant heating made the boards damp and covered the front window with steam—it was completely covered with steam, but they tore up the boards to relieve that so there would be circulation and it would dry out quicker, but we could touch the cement after the boards were torn up and it was damp.

Q. Then how long a period of time did it take for all of the damage to occur?

A. Well, I would say the worst damage was probably on Tuesday and Wednesday because I recall standing in the living room and we could hear loud cracks. Mr. Best was standing there and I was—I don't recall if Mr. Quinn was there or not, but several men were there and we heard this crack and [246] saw the wall open up and then about—during that week the kitchen ceiling cracked. Those are the prominent cracks. And then in the bedroom you could see as it extended toward the further end of the house. It began to develop. And in that further bathroom the walls are badly cracked and the dressing rooms where the door jambs are out of shape and the cracks are all still there.

.(Testimony of Helen J. Daniels.)

Q. Did you observe any damage in the hobby room?

A. Yes. That was very high in the center and of course—that hasn't been repaired and you have to be very careful how you put a table there or it will be tilted.

Q. How large is the hobby room?

A. Approximately 30 by 33 or something like that.

Q. That is the largest room in the house?

A. That is the largest room in the house.

Q. And how long did it take for all of this to occur? When was the damage apparently all done?

A. Well, I feel like it was all done that first week. It was right at the holidays and I know it was very disturbing. [247]

* * * * *

Cross Examination

Q. (By Mr. Davis): And on Sunday evening you had how many guests?

A. We had 20 surgery nurses from the Seaside Hospital.

* * * * *

Q. And you washed your dishes?

A. Yes. We couldn't use—we couldn't use any of the dishwashers or anything of that kind after that. We didn't have any hot water.

Q. And the night before——

A. Everything was normal. [248]

* * * * *

ROY O. ELMORE

called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Roy O. Elmore.

Direct Examination

Q. (By Mr. Davis): And what is your occupation, Mr. Elmore?

A. Resident manager of the Hartford Fire Insurance Company, Southern California Department.

Q. And as such are all losses and underwriting under your control? A. Yes.

Q. Jurisdiction? A. Yes.

Q. Are all losses reported to your office?

A. They are all reported to our office.

Q. When was the first time that the loss that is the subject of this lawsuit was reported to your office? A. April 19, 1950.

Q. And how was it reported?

A. It was reported by our agent, Hammond & Avery of Long Beach to our claims department.

Q. And on that report what did you do? Did you advise them you would do anything? [263]

A. Well, the way it occurred, Mr. — one of the partners called our claims department and asked that some papers be sent to Attorney McCarthy of Long Beach, and not knowing what those papers were about, since this was the first time we heard of the claim, I called Mr. Hammond and asked him what this was all about because with this reported claim we saw no reason to send any papers to an

(Testimony of Roy O. Elmore.)

attorney until we had time to investigate the claim.

Q. You so told him?

A. I so told Mr. Hammond.

Q. And did you cause an investigation to be made thereafter?

A. We assigned the claim immediately to the general adjustment bureau at Long Beach.

Q. And thereafter got a report from them?

A. Several days later we got a report from the adjuster that there was severe damage at this location.

Q. And then did you—what did you do then?

A. Asked him to proceed with very definite investigation, as far as he could go, and report back to us.

Q. And then did you employ anybody else to make a more detailed investigation?

A. After the general adjustment bureau had gone to a certain extent, feeling that we should have further expert testimony or expert investigation and engineer's reports, we [264] assigned Mr. John I. Shield, consulting engineer, to make further investigations.

Mr. Davis: I think that is all.

Cross Examination

Q. (By Mr. McCarthy): Mr. Shield was given full access to the Daniels premises, was he not?

A. We merely assigned it to him and told him to make whatever investigation he felt was necessary and whatever he did, of course, was on his own initiative as consulting engineer.

(Testimony of Roy O. Elmore.)

Q. Did he report to you that he was not given full access to the premises?

A. No; I don't think that he reported to us that he wasn't given full access. I did not consult with him very much until he returned his report, so I just accepted his report as returned.

* * * * *

JOHN E. SHIELD

called as a witness by the defendant, being first sworn, was examined and testified as follows: [265]

* * * * *

The Witness: John E. Shield.

Direct Examination

Q. (By Mr. Davis): What is your business or occupation, Mr. Shield?

A. I am consulting structural engineer. [266]

* * * * *

Q. And are you familiar with the general soil conditions in the Palos Verdes hills?

A. Yes, sir.

Q. Did you have occasion to go to the residence of Dr. [267] Daniels, Dr. and Mrs. Daniels?

A. I did, sir.

Q. Do you recall when that was?

A. On May 18, 1950.

Q. And at whose request did you go?

A. The request of Mr. Elmore.

Q. And how many times did you go on those premises?

(Testimony of John E. Shield.)

A. Twice, I believe. I went once and no one was home and so I immediately left.

Q. And then you went again?

A. Yes, sir.

Q. How soon after?

A. Well, three or four days after the first visit.

Q. And was anybody with you the second time?

A. I had two laborers with me.

Q. Did you see anybody at the premises?

A. I saw Mrs. Daniels.

Q. And what happened? Did she show you the place?

A. Yes, Mrs. Daniels showed me through the house completely. [268]

* * * * *

Q. Then you went back at a later occasion? [275]

A. Yes, sir.

Q. And with whom did you go that time?

A. I took with me Mr. Fred W. Rohe, a mechanical engineer.

Q. And by the way, did you interview anybody else who knew or purported to know anything about this condition other than Mrs. Daniels?

A. When?

Q. At the occasion of your first visit?

A. No.

Q. Later did you make any investigation by making inquiries of others? A. Yes.

Q. Who did you inquire from?

A. Inquired from Mr. Ward of the plumbing company, Mr. Coleman of the plumbing company,

(Testimony of John E. Shield.)

Mr. Reilley of the General Adjustment Bureau, Mr. Wing and Mr. Reynard.

Q. Were you given a copy of the plans and specifications by anyone?

A. Mr. Reilley gave me a copy of the plan.

Q. Do you know where he had gotten them?

A. I do not know.

Q. Those were copies of the plans that are before you now? A. Yes, sir. [276]

Q. Now, on the occasion of your second visit there or third—the second that you made any observations, was anybody with you besides Mr. Rohe?

A. No, sir. Well, Mrs. Daniels was there. She showed us through the house.

Q. Did she show you substantially the same thing as she had shown you the first time?

A. Yes; gave us complete access to the house.

Q. And did Mr. Rohe in your presence make an examination of any of the premises?

A. Yes; he made an examination of the water heater, the thermostat. Took the serial numbers of the various pieces of equipment and the names of the manufacturers and so on.

Q. Now based upon the information which you had and the observations you made at that time, and assuming that the water pipe had broken—I am not going to recite it, you have heard the testimony here, but at the place pointed out to you by Mrs. Daniels, did you come to any conclusions as to what caused that water pipe to burst? A. I did.

Q. Or break? A. I did.

(Testimony of John E. Shield.)

Q. What conclusions did you come to?

A. I came to the conclusion that the heavy rains which had fallen at that time caused the adobe to swell and caused [277] distortion in the house sufficient to cause the breakage of the pipe. [278]

* * * * *

Cross Examination

Q. (By Mr. McCarthy): Now how much rain had fallen within the week prior to December 18, 1949?

A. The only source of factual information for that is the United States Weather Bureau.

Q. You inquired, did you?

A. The Weather Bureau has two stations, one at Torrance and one at San Pedro. The location here is somewhat between those stations.

I did not inquire as to the amount of rain that had occurred immediately prior to the 18th, but on the 18th the figures were, I believe, 1.18 inches in Torrance and 1.66 inches in San Pedro.

Q. What was your figure for Torrance?

A. 1.18.

Q. And that was for the 18th? [279]

A. That is the way I got it from the Weather Bureau.

Q. Did you make any investigation as to what the rainfall had been at any prior time?

A. Yes.

Q. What did you find?

A. I found that there was some rainfall on November 9.

Q. And what was the amount?

(Testimony of John E. Shield.)

The Court: Hadn't been any between November 9 and December 18?

The Witness: Yes, there had been.

The Court: Just traces of rain or a substantial amount? We haven't been getting much rain around this country for the last six years.

The Witness: Yes, I rechecked with the Weather Bureau as to other times after my subsequent inquiry, and I found that they had also received reports from the Palos Verdes Water Company, which was closer to the source than their station.

Q. (By Mr. McCarthy): Did you rely on those reports in arriving at your opinion? A. Yes.

Q. What were those reports?

A. That on November 9 there had been over an inch of rain reported by the Palos Verdes Water Company and that for some three or four days an aggregate of probably less than an inch had fallen prior to December 18th. I don't [280] remember the figures.

Q. Did you obtain any data as to the rate at which this rainfall came down on December 18th?

A. It is only reported on a 24-hour basis.

Q. So that the data you got was somewhere between 1.18 inches and 1.66 inches in a 24-hour period? A. Yes.

* * * * *

Q. Inviting your attention to the floor plan here, sheet No. 3 of Exhibit 1, the area which I indicate here is a driveway, is it not? A. Correct.

Q. And along the westerly side of the house

(Testimony of John E. Shield.)

there are flower beds? A. That is correct.

Q. And the driveway goes right on through alongside them? A. Yes.

Q. And then to the west of the driveway when you inspected it, there was a retaining wall?

A. That is correct.

Q. And it was to the west of the retaining wall that you dug two of your holes?

A. That is correct.

Q. What is the material of the driveway?

A. Asphaltic concrete, as I recall it.

Q. It was a relatively impervious material, was it not? A. Yes.

Q. Then did you observe the slope of that driveway? A. It was fairly level.

Q. Did it have any slope?

A. I did not put an instrument on it.

Q. Did you take any—make any observations to determine whether or not water falling in the vicinity of the house would flow toward the house or away from the house?

A. Since the hill came up like this from the west side of the house obviously water would have flowed toward the house.

Q. Still you didn't answer my question. Would you read the question, please?

(Question read.) [282]

Q. Will you indicate what you mean by your answer?

A. What do you mean by vicinity?

Q. Well, let us say the west side of the house.

(Testimony of John E. Shield.)

A. How far west?

Q. As far west as where you saw the retaining wall.

A. There must have been some drainage provided for the driveway.

Q. Did you observe whether there was?

A. No, I didn't.

Q. Did you observe that the driveway from a point about opposite the dining room to the south-end of the house slopes to the south?

A. That would be the natural way to put it in.

Q. Well, did you observe it? A. No.

Q. Did you observe that the driveway also sloped away from the house, sloped to the west going down? A. No. [283]

* * * * *

The Court: As I understand from this witness, you got complete cooperation from the Daniels?

The Witness: That is correct.

* * * * *

Q. All right. Now you have given the opinion that the heavy rains swelled the adobe and distorted the foundations of the house? A. Yes.

Q. What part of the foundations of the house were, in your opinion, distorted?

A. I think——

Q. By these heavy rains.

A. All the exterior foundations.

Q. The entire house? A. Yes, sir.

The Court: Were there any cracks in the concrete that you observed?

(Testimony of John E. Shield.)

The Witness: I couldn't observe any, your Honor.

Q. (By Mr. McCarthy): Did you inspect to see if there were any?

A. I know the characteristics of adobe, Mr. McCarthy, [285] and always when it is wet it swells.

Q. Very well. My question is did you inspect any of the foundations of the house to see if there were any cracks in it?

A. Only at that one point I mentioned there.

Q. That indicates S-5? A. Yes.

Q. And did you find any cracks there?

A. I did not.

Q. And as I understand it that is the only—S-5 is the only point on the entire foundation of this house that you even inspected for cracks?

A. I did not make the inspection for cracks. I made the inspection to determine the depth of the foundation walls.

Q. All right. Now you say that all of the foundations in this house, in your opinion, rose because of these heavy rains?

A. All the exterior foundations? I should say, yes. Whether it was a measurable amount or not I wouldn't say.

Q. Well, now, by "a measurable amount" what do you mean? Ten thousandths of an inch or what?

A. Depends on how you try to measure it.

The Court: Well, gentlemen, you are arguing about something that isn't helping me at all. You

(Testimony of John E. Shield.)

are going into details. You are arguing with an expert. [286]

He told me what he based his opinion on and I want to ask him a few questions.

Did you know when you made your inspection that the thermostat on the hot water heater had failed to work and they heard a noise from the heater?

The Witness: Yes, sir.

The Court: And when they turned on the water that steam came out?

The Witness: Yes, sir.

The Court: And for a short time water?

The Witness: I didn't go into the details. Mrs. Daniels did explain that for me, yes, sir.

The Court: And you had that information before you?

The Witness: Yes, sir.

The Court: And you didn't give any consideration—you disregarded that entirely in coming to your opinion as to the cause of the damage?

The Witness: My opinion was given only after the mechanical equipment and conditions of the mechanical equipment had been inspected by the mechanical engineer with whom I associated.

The Court: But your conclusion was that it was water under the house that caused the damage?

The Witness: There is no doubt that water under the house caused the damage. [287]

The Court: And it is just a question as to that. You think it came from rainfall while the plaintiff contends it came from the break in the water pipe.

(Testimony of John E. Shield.)

The Witness: I should say would be the essential difference.

The Court: Do you think the break in the water pipe had any effect on the condition of that house after running for two or three days?

The Witness: Oh, yes. The break probably leaked water at the rate of five to 10 gallons a minute. There could be in the order of four or five hundred gallons an hour.

The Court: How many days before it was repaired?

Mr. McCarthy: About two days—between 7:00 o'clock on the morning of the 18th until the Doctor had it shut off for a short time—safely 25 to 30 hours or something of that kind.

The Court: Would that have any effect on the foundation, that amount of water over a period of 25 hours?

The Witness: Surely. During the time that it was broken and running at this point the water undoubtedly permeated to all other parts of the house causing the damage that is now observable.

The Court: That is what?

The Witness: That is now observable.

Mr. McCarthy: Was your Honor finished? [288]

The Court: I don't care to hear any more cross examination unless you want to go ahead with it.

* * * * * [289]

JOHN WARD

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: John Ward.

Direct Examination

Q. (By Mr. Davis): Mr. Ward, what is your business or profession?

A. I am in the plumbing and heating and construction business. [311]

* * * * *

Q. And did you have the plumbing contract for this house of Mr. Daniels?

A. Ward and Kincannon Plumbing Company had it.

Q. And that plumbing was in—the plumbing that was in that house was done directly under your supervision?

A. Yes, sir. [312]

Cross Examination

Q. Now, the thread that is cut by the kind of tools that you used on this job is a sharp “V,” is it not?

A. Yes.

Q. So that each groove of the thread ends in a very [345] small area?

A. That is right.

Q. Do you know whether or not the bottom of the thread of a pipe such as this, that the “V” is the weakest point in that pipe?

A. I would say the thread is the weakest point of a pipe.

The Court: The weakest point is where the

(Testimony of John Ward.)

thread and the "T" come together—on the outside where this pipe broke?

The Witness: Yes, sir.

The Court: That is the weakest point?

The Witness: Yes, that is the weakest point of a section of pipe. [347]

* * * * *

Q. (By Mr. McCarthy): No, Mr. Ward, have you ever had any experience with water hammer?

A. Yes.

Q. And what is water hammer?

A. Water hammer—I may not be able to give the technical definition of water hammer, but I can give you the general idea of water hammer.

Water doesn't compress, or it is not noticeably able to compress, so when water is rushing down a pipe and you turn a faucet off, well, the water is suddenly stopped and if there isn't some sort of cushion to receive that shock, why, you are very apt to have water hammer. It is a noise that I am sure most everyone is familiar with.

Q. And do you know anything about the magnitude of the pressures that are developed by water hammer?

A. Well, I know that water hammer can cause an awful lot of damage and cause an awful lot of pressure. [350]

Q. Sufficient to break pipes and other fittings?

A. Well, I would say I never have had any experience with water hammer breaking any pipe but I am sure that it could.

* * * * *

(Testimony of John Ward.)

Q. (By Mr. McCarthy): Now, do you know how water hammer can be caused?

* * * * *

The Witness: Well, of course, to have water hammer you would have to have an absence of any cushion and if you have the absence of this cushion and a sudden force of water can be caused in any pipe—anytime you have water rushing down to one end of the pipe and you turn the water off at the end of a long run of pipe—you have a lavatory way off upstairs, say in an apartment house, for instance, a toilet way up in front of the apartment house, and the farthest point of the house is usually where you have water hammer because you have the water rushing down to that end of the house and you shut the faucet off and shee will rattle. [351]

* * * * *

ROBERT AVERY

called as a witness by the plaintiffs, being first sworn, was examined and testified as follows: [360]

* * * *

Direct Examination

Q. (By Mr. McCarthy): What is your occupation, Mr. Avery? A. Insurance agent.

Q. And you are agent for the Hartford Fire Insurance Company? A. Yes.

Q. Now, where is your place of business?

A. No. 30 Linden in Long Beach.

Q. And are you acquainted with Dr. Daniels, the plaintiff in this case? A. Yes.

Q. And with Kenneth Wing, the architect?

(Testimony of Robert Avery.)

A. Yes.

Q. Mr. Wing's offices are adjacent to yours, in the same building?

A. They are upstairs in the same building.

Q. Now, inviting your attention to a date within a few days after December 18, 1949, did you have a conversation with Mr. Kenneth Wing regarding the Daniels' house?

A. Yes, I did.

Q. And who were present?

A. I think I was the only one present at that time.

Q. And what was said?

Mr. Davis: Of course I am making the same objection as I [361] did before.

The Court: Same ruling.

The Witness: Mr. Wing told me of the damage caused to Dr. Daniels' house as a result of failure of some of the plumbing, resulting in water damage.

Q. (By Mr. McCarthy): Now, just what did he tell you? Did he say any more than that?

A. Well, he said that he thought that it was a condition in the thermostat at that time as I remember it.

Q. And what did he say about the thermostat?

A. Well, as I recall the conversation he said that the thermostat had apparently given way to pressure and broken, permitting the water to seep in and under the house.

Q. And what else was said in that conversation?

A. The conversation was largely as to the extent of the damage to the house and some query on his

(Testimony of Robert Avery.)

part as to whether Dr. Daniels' fire insurance policy would cover the damage.

Q. Now, were you familiar with Dr. Daniels' fire insurance policy? A. Yes.

Q. And what was your reply?

A. The reply was that he did not have coverage for water damage.

Q. And was anything further said about it?

A. No, I don't believe so. [362]

Q. Now, did you make any report to anyone connected with the Hartford Fire Insurance Company regarding this matter?

A. Not directly at that particular time. At a later date, oh, within two weeks it was discussed rather thoroughly with John Kilgore, who was a special agent for the Hartford Fire Insurance Company and it was also discussed at some length with Russell Thomas, who was an adjuster for the Hartford Accident and Indemnity Company and also with Mr. Frank Homer, who was a special agent for the Hartford Accident and Indemnity Company.

Q. Now, did you at or about the same date have any conversation with Dr. Daniels?

A. Yes. Dr. Daniels called me on the phone to inquire if he had coverage for water damage and started to tell me of the extent of the damage, and I told him that I had already discussed it quite thoroughly with Kenneth Wing, the architect, and I gave him the same answer, that he did not have coverage for water damage.

Mr. McCarthy: You may cross examine.

(Testimony of Robert Avery.)

Cross Examination

Q. (By Mr. Davis): When was that that Dr. Daniels called you?

A. As I recall it was the 21st of December. The reason that date fixes itself in my memory was because my mother's [363] brother passed away on that date in Missouri.

Q. Are you and Mr. Wing—you and Mr. Wing are engaged in some enterprises together?

A. The only enterprise we are engaged in is that Mr. Wing and myself and Mr. Hammond each own a third interest in the building in which we are located.

Q. Dr. Daniels is not interested with you?

A. No, sir.

Q. You are a friend of Dr. Daniels?

A. Yes, sir.

Q. And have been procuring his insurance for him over a period of time?

A. That is right.

Mr. Davis: I think that is all, Mr. Avery.

The Court: Just a moment. I believe the architect said something about you having made some inquiry over the telephone as to whether this was covered. Do you recall anything about that? Did you check with somebody to find out whether he was covered or not?

The Witness: I don't believe that I did, sir. The question that Dr. Daniels and Mr. Wing asked us at the time as whether or not the policy covered water damage and it definitely does not as water damage.

The Court: Did he tell you in substance—well, he

(Testimony of Robert Avery.)

told you in substance and effect the break in the pipe was caused [364] by the excessive heat from the water heater?

The Witness: That is right.

The Court: But nevertheless you gave him that answer and you knew that he was claiming it was a break which came as a result of the thermostat failing to work and not the hot water heater itself?

The Witness: That is right.

The Court: That is, you had that information?

The Witness: That is right.

The Court: That is all.

Q. (By Mr. Davis): As I understood, you got the impression from Mr. Wing that the thermostat had failed and the water had leaked under the house? A. That is correct.

Q. You didn't have any knowledge that there was a break of the pipe under the house?

A. No, sir.

Q. At that time? A. No, sir.

The Court: Another question. Afterwards did you call Mr. Daniels' attention to the fact that he may have been covered by the policy?

The Witness: Yes, we did. We subscribed to a service called the "F. C. & S. Bulletins" which provide us with monthly written reports of the changes in various types of [365] insurance and also gives resumes of cases which have been decided on court points, and in the April issue of that service was a resume of a case which was very similar to Dr. Daniels' case and when we had read that and dis-

(Testimony of Robert Avery.)

cussed it we called Dr. Daniels and told him of the circumstances and suggested that he should file a claim as a result of that.

The Court: And did he file a claim?

The Witness: That is correct.

The Court: That is all.

Q. (By Mr. Davis): It was after that that he notified the Hartford Fire Insurance Company of the claim? A. That is right.

The Court: Are you what is called a general insurance agent?

The Witness: Yes, sir.

The Court: Representing many fire insurance companies?

The Witness: Yes, sir.

Mr. McCarthy: One further question.

Redirect Examination

Q. (By Mr. McCarthy): As a part of your duty has the Hartford Fire Insurance Company instructed you to report to it any claims of which you acquire knowledge? A. Yes, sir.

Q. And do you sign policies as agent for the Hartford [366] Fire Insurance Company?

Mr. Davis: I think I will object to that.

The Court: That has been admitted.

Mr. Davis: It is admitted first of all that he signed this particular policy.

Mr. McCarthy: I think he did sign this particular policy.

Mr. Davis: Yes, I admitted that in the pleadings and admitted it yesterday.

(Testimony of Robert Avery.)

Mr. McCarthy: That is probably an unnecessary question. That is all.

Mr. Davis: That is all.

The Court: You may go back to Long Beach and sell some more insurance.

The Witness: Thank you.

The Court: Call your next witness.

Mr. Davis: I will call Mr. Coleman.

FOSTER COLEMAN

called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Foster Coleman.

Direct Examination

Q. (By Mr. Davis): Mr. Coleman, what is your business, trade or profession? [367]

A. I am a plumber by trade.

* * * * *

Q. And as such did you do any work on the Daniels—in the course of your employment do any work on the Daniels property?

A. Yes, I installed the plumbing there. [368]

* * * * *

Q. Now, did you install the pressure reducer?

A. Yes.

Q. And do you recall what that pressure reducer was reduced to?

A. 45 pounds. [372]

* * * * *

Q. Now will you describe this T break?

A. Well, the break was in the last engaged thread in the fitting. [384]

* * * * *

ROBERT E. QUINN

called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Robert E. Quinn.

Direct Examination

Q. (By Mr. Davis): I understand, Mr. Quinn, that you are a special representative for Bastian-Morley Co.?

A. District sales representative.

Q. And Bastian-Morley Co. manufacture these tanks for Crane Co.?

A. Yes, sir. [389]

* * * * *

Cross Examination

The Court: Did you say that tank showed evidence of extreme heat?

The Witness: Well, from the exterior it looked like it had had heat on it, yes, sir. [395]

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PAUL E. JEFFERS

called as a witness by the defendant, being first sworn, was examined and testified as follows: [396]

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Cross Examination

Q. (By Mr. McCarthy): Would you say, Mr. Jeffers, that it was impossible that water hammer was the cause of the break of this pipe?

A. I would say improbable.

(Testimony of Paul E. Jeffers.)

Q. You wouldn't say it was impossible?

A. No. [410]

* * * * *

Q. Now, you spoke of the possible differential movement of the building as a possible cause of the break in this line. Did you observe any evidence of that? A. I didn't even see the building.

Q. You haven't seen the building at all?

A. No. [411]

* * * * *

Q. Doctor—Mr. Jeffers, what is the temperature of water at atmospheric pressure under standard conditions, at sea level? Is it 212 degrees?

Mr. Davis: Boiling point. [416]

The Witness: Yes, it boils at 212 degrees.

Q. (By Mr. McCarthy): But if that is placed in a confined system the boiling point of water is increased as the pressure is increased?

A. That is correct.

Q. Do you know what the temperature of water—what the boiling point of water is under 45 pounds pressure? A. No, I can't say definitely.

Q. Is it about 292 degrees Fahrenheit?

A. I would say that is probably a reasonable figure. I can't recall the figures without referring to a table.

Q. Do you have a table?

A. No, I haven't but I would say probably that is correct.

Q. Now in order to boil water in this water heater it was necessary to raise the temperature of

(Testimony of Paul E. Jeffers.)

that water to approximately 290 degrees, was it not?

A. That is right.

Q. Because it had a head of 45 pounds of water pressure on it? A. Right.

Q. Now, what is the effect of suddenly releasing the pressure on unvaporized water which has in an enclosed container attained a temperature of 292 degrees?

A. If you got a very sudden release, why, you would [417] probably get a very sudden generation of steam.

Q. It would just flash into steam, would it not?

A. Very rapidly.

Q. And would any energy be dissipated in that manner?

A. Well, you couldn't increase the pressure any.

Q. No, but you would get kinetic energy, would you not? A. (No answer.)

Q. What I am getting at is when water flashes into steam it expands?

A. Yes, that is true but there again you see the minute that you build up your 45 pounds pressure it would cease.

Q. The pressure would cease?

A. No, the generation of steam would cease.

Q. The generation of steam would cease, yes, that is quite true, but kinetic energy would be developed by the flashing of water into steam under those circumstances?

A. You develop a potential energy there. I am not so sure about the kinetic energy.

(Testimony of Paul E. Jeffers.)

Q. You are unwilling to give an opinion on that?

A. Yes, I wouldn't want to say offhand.

Q. Now, coming to this matter of water hammer. Water hammer is actually caused by the movement of water, is it not?

A. Caused by the stoppage of the movement of water.

Q. The water must be placed in motion in some manner, [418] however?

A. Before you can have it, yes.

Q. And can it be caused by a sudden pressure being put on the water as from a pump that has started up too quickly?

A. Yes; if your pump has no expansion chamber.

Q. What I am getting at is you can get water hammer by the addition of energy as well as by the subtraction of it?

A. That is right.

Q. And it doesn't make much difference how that energy is added, whether by a pump or any other way that tends to place that water in motion?

A. Well, if you could start a pump fast enough you wouldn't have to place the water in motion.

Q. You would get your water hammer?

A. You would have it just the same.

Q. Anything that—

A. Would give you a sudden load on the water would give you the effect of water hammer.

Q. Now, water hammer is a rather common phenomena, is it not? That is, it is encountered in steamship boilers?

A. And you find it under certain conditions, yes.

(Testimony of Paul E. Jeffers.)

Q. And what are the causes of water hammer—how can it be created?

A. Water hammer per se is merely the effect of absorbing the kinetic energy in a flowing stream of water and absorbing [419] it suddenly.

Q. That is right, and anything that will cause that sudden addition of kinetic energy can cause water hammer?

A. The result is the same, yes.

Q. Now, is there any way to measure the exact intensity of water hammer?

A. Yes. It could be computed if you knew just exactly the period of time that was involved in the addition or the introduction of the shut-off.

Q. And water hammer in effect produces a sudden very large increase in pressures momentarily?

A. That is right [420]

* * * * *

Q. Now, water pressure acts in all directions, does it not? A. That is right.

Q. And so that if the break here occurred from internal pressure you would have pressure exerted in that direction? A. Yes, sir.

Q. And that direction and that direction?

A. Yes.

Q. Up and down and all the way around?

A. That is right.

Q. Now, if the pressure was exerted in this direction, that would be transmitted by the speed of sound in water?

(Testimony of Paul E. Jeffers.)

A. Just a moment. Your pressures are static—they are not transmitted.

Q. Let us say we had water hammer.

A. Okay.

Q. That water hammer occurred—that would have created an instantaneous pressure in the system, would it not? A. That is right.

Q. And that pressure would have operated in all directions? [421] A. That is right.

Q. So it would have traveled at the speed of sound in water, would it not?

A. That is right, yes. [422]

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Redirect Examination

Q. (By Mr. Davis): Water hammer and breakage from water hammer would be accompanied by a loud noise, wouldn't it? A. Yes, sir.

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JEROME PINKUS

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows: [424]

* * * * *

A. I am a mechanical engineer.

Q. What was your education?

A. I graduated from, with a B. S. from the Armour Institute of Technology in Chicago.

Q. When was that? A. 1934.

Q. And following your graduation did you do any research work?

A. I entered the employ of Crane Company in their research and development laboratories. [425]

(Testimony of Jerome Pinkus.)

* * * * *

The Court: In the first place, ask him if he is familiar with the water hammer problem.

The Witness: Yes, I am familiar with water hammer problems. We made quite a study of it at Crane Company and particularly because we manufactured valves and in hydraulics or water flow of any kind, why, there have been lots of questions on water hammer and there has been a lot of investigation, not only by Crane Company but others on the subject of water hammer.

Q. (By Mr. Davis): That was in the line of your research during your time there?

A. Yes. I worked on it at one time or another.
[434]

* * * * *

Cross Examination

Q. (By Mr. McCarthy): You have done a good deal of research on the subject of water hammer, is that correct?

A. I have done some, yes.

Q. And in that research you attempted to create water hammer?

A. That is right.

Q. And you create it with the greatest possible intensity and to destroy valves, fittings and other things by water hammer?

A. That is right, sir.

Q. Did you ever succeed in destroying anything with water hammer?

A. Yes, we did with cast-iron equipment.

Q. And what was the largest item of equipment that you succeeded in destroying with it?

A. At the time of our investigation we went up

(Testimony of Jerome Pinkus.)

to about 6 or 8 inch diameter pipe and valves.

Q. And you worked only on cast-iron valves?

A. No. We did steel valves but we found that the steel did not have the tendency to break like the cast-iron.

Q. Of course your steel valves are made of chrome steel or molybdenum steel?

A. Not always—just plain carbon steel valves, too. [438]

Q. What was the largest valve you succeeded in breaking?

A. Well, I don't recall exactly, but they were around the order of 10 and 12 inch diameter valves.

Q. And a 10 or 12 inch diameter valve stands about that high? A. That is right.

Q. Five or six feet high?

A. That is right, yes. [439]

* * * * *

Q. (By Mr. McCarthy): Now did you do any, in your research on the subject of water hammer, did you do any research on the creation of water hammer by the introduction of steam into water? [441]

A. No. We did our work with water flow—a flow of cold water.

Q. That is, you just closed a valve suddenly?

A. But we did do work of injecting high pressure steam in the pipelines to see what happens to flanges in the piping and bolt stresses and so on.

Q. And you created water hammer in that manner?

A. We created a knocking of the pipe, let us say.

(Testimony of Jerome Pinkus.)

Q. Did you not create a sudden momentary increase in pressure in the pipe in that manner?

A. A surge, yes, we did.

Q. A "surge" is really the technical name for the phenomenon of water hammer, is it not?

A. That is what I call it.

Q. Now, you understood that the water main pressure in this installation here was something of the order of 120 to 140 pounds?

A. 125 pounds, I heard someone say.

Q. So in order to back steam clear up into the water main it would be necessary to have at least 125 pounds of pressure on the water heater?

A. You would have to have it at least that or more.

Q. The pressure on the water heater would have to be at least 120 pounds in order to back steam clear up into the water main? [442]

A. Steam or hot water, let us say. There has been no establishment of steam.

Q. Do you know the boiling point of water under 100 pounds of pressure? It is approximately 338 degrees, is it not?

A. If I had a steam table I could tell you but I know at 45 pounds per square inch it is around 290.

Q. And have you checked it for any pressure above that? A. Right now, no.

Q. Now, the effect of suddenly reducing the pressure on water that is under—that is heated above, say at 290 degrees, what is the effect of suddenly

(Testimony of Jerome Pinkus.)

reducing the pressure on water heated to 290 degrees?

A. Well, first of all, there is just—it will keep on building up pressure and temperature until there is some sort of an opening, let us say.

Q. Until the pressure is released, that was my question.

A. Until the pressure is released, that is right.

Q. When the pressure is released what happens?

A. You flash a certain percentage of it into steam, a small percentage.

Q. And what part of that goes into kinetic energy?

A. It is a change of state phenomenon. [443]

Q. But it goes into kinetic energy?

A. You change state from steam to water or water to steam. That is known as a change of state.

Q. And that will effect whatever happens to be around it; if it is water it affects water?

A. Yes, and energy is released.

Q. And will it, if it is in an enclosed system, it will create a surge in the water, will it not, a pressure wave?

A. It is possible to set up where you release the pressure—water will flow where you release the pressure.

Q. And if it is released suddenly a surge of energy will go into that water, will it not?

A. It is possible.

Mr. McCarthy: That is all.

Mr. Davis: Go ahead, explain.

The Witness: I have heard no mention of any

(Testimony of Jerome Pinkus.)

noise or anything accompanying it. Whenever you have a change of state, a flashing of the steam, you have a terrific amount of noise. You can hear it. It is audible.

Q. (By Mr. McCarthy): How far would you expect to be able to hear it in ordinary air?

A. Across this room and maybe more.

Q. And how far would you expect to hear it through four inches of concrete, an inch of crushed rock, a carpet [444] and with the noise of steam escaping?

A. I would hear it because it would come back to the boiler. If you set up these surges and everything your water heater would rock. You would hear it. And that is on the same level as the rest of the house. You see, sir, the water backs up into the water heater, which is a sort of a chamber. It is much bigger than the rest of the pipe in capacity and if a pressure came in there the heater would rock back and forth.

Q. By the way, the principal safety device on this type of water heater—that is, against the possibility of the thermostat failing to open, is the backing up of steam into the cold water line.

A. Let us not say "steam." Let us say "hot water."

Q. All right, hot water. That is the principal safety device, is it not?

A. Yes. It would back up into the cold water lines all the way out into the street.

Q. And it might, if the cold water line burst,

(Testimony of Jerome Pinkus.)

that would relieve the water pressure on the heater, would it not, relieve the pressure?

A. Relieve pressure, yes.

Q. And you wouldn't be able to get any water out of the hot water faucet, then?

A. Very little. It would depend. Now, you want to [445] remember that the type of break must be considered. It is like taking a hose and you have a little break down here near the end of the nozzle and water runs out and you get a release of pressure, but you still get water out of the nozzle, too.

Q. What I am getting at is the time.

A. The time—the period of water hammer, do you mean? Do you want me to develop that for you?

Q. No. That is almost instantaneous, is it not?

A. It varies with the length of the pipe and the velocity of the pressure wave. If you take the maximum of, let us say, 4700 feet per second, which is the speed of sound in the pipe, the period is actually twice the length of the pipe divided by the 4660. Now if you have 500 feet of pipe that is only about a quarter or a fifth of a second. It is mighty fast. [446]

* * * * *

The Court: Just a moment. I would like to call back Mr. Pinkus. I would like to ask him a question for my own information.

Mr. Pinkus, in your experience with water heaters, if you find that you turn on your water taps and steam comes [449] out, would that indicate to you

(Testimony of Jerome Pinkus.)

that there was something wrong with the thermostat?

Mr. Pinkus: Not necessarily, your Honor.

The Court: What might it be?

Mr. Pinkus: It is possible—water even at 160 degrees or 180 degrees, which is now required for laundromats and so on, when you open up the tap it comes out full of so-called steam, but it is still water—water and a lot of steam.

The Court: But you have heard the description here, how it came out—that steam shot out?

Mr. Pinkus: Yes, I heard that.

The Court: That indicated the water was too hot, didn't it?

Mr. Pinkus: That it was beyond the boiling point, is right. [450]

* * * * *

ESLI H. DANIELS

heretofore sworn, resumed the stand and testified as follows: [454]

Direct Examination

Q. (By Mr. McCarthy): I don't believe you were questioned on the subject of whether you heard any noise at the time you opened the hot water faucet and steam escaped. Did you hear any noise at that time?

A. Well, I was in the bathroom and my son was in there with me. When I opened the tap there was a lot of noise accompanied by the steam.

Q. That is, you heard noise from the steam?

A. I heard noise from the steam—I mean the

(Testimony of Esli H. Daniels.)

rushing of the steam, and that was when I turned the tap on. We were both standing right there together.

Q. Did you hear any noise from the vicinity of the hot water heater?

A. Not that I remember.

Q. Do you recall whether you closed the door into that compartment after you shut off the gas?

A. No, I don't recall that.

Q. But there was noise from escaping steam?

A. There was a lot of noise, yes. [455]

* * * * *

Q. Now, Dr. Daniels, you testified in your deposition that the only noise that you heard there, and I think you testified here previously, the only noise you heard was the hissing sound.

A. Just gurgling—a kind of gurgling sound.

Q. Escaping steam. You didn't hear any rattle or chatter?

A. No, I didn't hear any rattle or chatter.

Q. Either at the tank or at the hot water cock?

A. No. You see, when I turned on the hot water cock that was making so much noise, when that came out—it made a lost of noise. [465]

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ROBERT L. DAUGHERTY

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Robert L. Daugherty.

(Testimony of Robert L. Daugherty.)

Direct Examination

Q. (By Mr. Davis): Mr. Daugherty, what is your profession?

A. I am the head of the mechanical and hydraulic engineering department of the California Institute of Technology. [483]

* * * * *

Q. The heater was a Crane Champion heater with a tested pressure of 350 pounds and a rated pressure of, I think, 145 pounds.

Assuming all those things and assuming the break as I have described it to you, what in your opinion would such a break—in your opinion would such a break have occurred by internal pressure, by the water or heating system—hot water heating system? [488]

A. No, it could not have happened by internal pressure.

Q. Could it have happened by water hammer?

A. No, it could not.

Q. Could it happen by anything internally?

A. No.

Q. Now will you explain your answer?

A. Well, a pipe of this size and constructed as a $\frac{3}{4}$ -inch pipe is with this thickness would require pressure in the neighborhood of 9,000 pounds per square inch to cause it to rupture. But actually that would be true only in case the pipe was of absolutely uniform construction all the way around, whereas as a matter of fact such a pipe is made by rolling together a sheet of steel and then welding the joint

(Testimony of Robert L. Daugherty.)

longitudinally along the pipe and that is somewhat weaker than the rest of the pipe. That being true, it would probably rupture at a pressure a little less than 9,000 pounds per square inch, but not a great deal less. And that rupture if it took place by internal pressure would be a longitudinal rupture—that is, along the axis of the pipe and almost invariably along this seam.

Any cylinder of any construction whatever has twice as much strength around a joint such as the place where this broke, against internal pressure, as it does along a longitudinal pressure, so that if it would take [489] 7,000 pounds per square inch to rupture this along its axis it would require at least 14,000 pounds per square inch internal pressure to cause a break at right angles to the axis of the pipe such as took place here and therefore I cannot believe that the break was caused by any internal pressure.

You asked the question about water hammer. The pressure caused by water hammer would have a maximum value of 6—in this particular pipe of 61 $\frac{3}{10}$ times whatever change of velocity took place almost instantaneously.

Now, if the velocity in the pipe was 10 feet per second, which is higher than it probably could ever be, and that were stopped instantly to zero, the water hammer pressure would be only 613 pounds per square inch which is about less than one-tenth the pressure necessary to rupture the pipe longitudinally and only $\frac{1}{20}$ th of the pressure which

(Testimony of Robert L. Daugherty.)

would be necessary to rupture it at right angles, so I can't believe that this pipe could have been ruptured by any internal pressure caused by water hammer or any other cause.

Q. Now you had in mind that the hot water cocks were opened and kept open. Under those conditions, could, in that system as I have shown it to you, could a hot water—could a water hammer develop?

A. No. Water hammer could only develop when there [490] is initially a flow and so a pressure velocity of water through a pipe and that flow is suddenly stopped by closing a valve very quickly. That is the only way that water hammer can occur.

Q. Now can you or have you computed the bursting strength of a pipe of this character and this diameter and dimension?

A. That is the figure which I just gave you. It would be probably along this seam. A little bit less than 9,000 pounds per square inch. Possibly 7 or 8 thousand pounds per square inch would be the bursting pressure and that would be along the seam and not across a joint at right angles to that.

Mr. Davis: I think you may inquire.

The Court: I would like to ask this witness a few questions.

I am sitting here in the center of different experts on this question and maybe you can help me.

Here we have a case, which I presume has been explained to you, where the doctor, the owner of the premises, heard this hot water heater and he im-

(Testimony of Robert L. Daugherty.)

mediately turned off the gas and opened up the water cocks in the bathroom and in the kitchen and almost immediately the water stopped flowing and, as has been explained here, in due time they found where the break was. [491]

Isn't it a rather strange coincidence that those two should occur at the same time when there was undoubtedly pressure in that pipe?

The Witness: Yes, there seems to be a coincidence, but I am unable to see any relation between the two. I have thought that over.

The Court: And the fact that after they repaired the pipe and replaced the pipe and replaced the thermostat they haven't had any more trouble. They put on a safety valve on the heater and since then they have had no trouble.

The Witness: Of course, I don't know what caused the pipe to break in the first place. I could only hazard a guess on that. I imagine that the pipe must have broken because of some pull, some tension on it.

The Court: Wouldn't that same tension exist after it had been replaced?

The Witness: Not necessarily so because they put in a new pipe. The fact that after this break there was a gap in the pipe would indicate somehow or other there had been some shifting of the foundations or otherwise that would have put this pipe under tension and pulled that in two at that point and leave the gap.

That is only a guess on my part because I can't

(Testimony of Robert L. Daugherty.)

speak with any authority on that, not having been down there and investigated it personally as to what really took place. [492]

The Court: Assume that there had been a defective thread at that point, and there is no evidence that there was as far as that is concerned, in this case, but that is the one place that would give way, is that not true?

The Witness: It would still give way because there was some tension in the pipe. Now if you put in another piece of pipe that was a little bit stronger than the pipe already there it wouldn't be under that tension and it would be all right.

The Court: There has been testimony here to the effect that that is the weakest point in the pipe.

The Witness: It is the weakest point intension, yes, but not against internal pressure.

The Court: That is all.

Cross Examination

Q. (By Mr. McCarthy): On that subject, Professor Daugherty, as I understand it you feel that the threaded part of the pipe is not the weakest against internal pressure. Did I understand you correctly?

A. Well, I would say it is the weakest part in tension and internal pressure, yes, but the break, if it would occur longitudinally and not at right angles to the pipe, which is my point, is twice as strong, at least, against a break that way as the other way. [493]

(Testimony of Robert L. Daugherty.)

The Court: Would that depend on whether the threads are completely imbedded in the T or not?

The Witness: No. Whatever the thickness might be there, it is the same—the stress is one way.

The Court: But the testimony was that reduces the strength of the pipe where the threads are.

The Witness: Yes.

The Court: For instance, if the threads were not completely imbedded in the T those threads would have a tendency to be the weakest point, would they not?

The Witness: Yes, but it would still rupture longitudinally.

The Court: It would depend on the depth of the threads, would it not?

The Witness: I don't think so. If this pipe were extremely thin, thinner than the part that remains in the thread, it would still rupture along the axis and not at right angles to the axis because there is no question about the mathematics of this case, that the stress in one direction is just twice the stress in the other for the same internal pressure so against internal pressure the split would always be lengthwise, as I understand it is in this exhibit that is down here before the court.

Q. (By Mr. McCarthy): Isn't it a fact, Professor Daugherty, that a sharp V opening in a piece of metal, where [494] you have a piece of metal with a sharp V opening in it such as a V cut thread that the bottom of this V is the weakest part of the metal.

A. That is true.

(Testimony of Robert L. Daugherty.)

Q. And that when a piece of metal has been heavily scored with a V fails, it fails at the bottom of the V? A. That is true.

Q. And in the case of a thread such as these, the bottom of the V is crossways of the pipe and around it? A. That is right.

Q. Now in arriving at your opinion, Professor Daugherty, you assumed that the pipe was of uniform strength. A. Yes.

Q. Without defects? A. That is right.

Q. And that the threads were cut strictly according to specifications?

A. Oh, yes, because I had no other information on which to base any calculation.

Q. I quite appreciate that. Now did you arrive at any conclusion, any opinion as to when this pipe broke?

A. No, I did not. I have no information that would enable me to tell that.

Q. Were you told that the steam pressure on the hot [495] water faucet at the time Dr. Daniels opened the faucet was of sufficient force to drive out the anti-splash device that was inside of the faucet?

A. No, I don't believe I was aware of that.

Q. You are familiar with the general construction of these faucets with a metal splash guard inside? A. Yes.

Q. Which is intended to prevent splashing of the water? A. That is right.

Q. Have you any opinion as to the amount of

(Testimony of Robert L. Daugherty.)

steam pressure that would be required to blow one of those devices out of the faucet?

A. No, I don't think I could make any guess on that because it would depend on how tightly it happened to be fitted in there. I don't think anybody could tell that.

Q. But it would require a substantial pressure, would it not? A. Yes.

Q. Now, you are also familiar with the construction of Crane hot water heaters such as this?

A. In a general way. I haven't studied the diagram at all. I haven't even seen it before this minute.

Q. This is intended to illustrate the manner of construction of the Crane hot water heater. The pipe close [496] to the figure 1 here is the cold water pipe—that is the cold water inlet to the tank and goes down to a point some inches above the bottom of the inside of the tank.

Now if any substantial amount of steam pressure had built up in this hot water tank, in this instance, and the cold water line had been broken at a point say 10 feet from the hot water heater, that steam pressure would have been relieved through the break in the line, would it not? A. Yes.

Q. And if there was a substantial amount of steam pressure on and since that pressure would have been relieved, you would not expect to find any steam pressure on the hot water side of the system either? A. No.

Q. So the fact that hot water or that a substan-

(Testimony of Robert L. Daugherty.)

tial steam pressure was experienced on the hot water side of the line indicates, does it not, that the cold water line was intact at the time Dr. Daniels opened the faucet?

A. That would seem to be so but, on the other hand, I must point out this fact, that the strength against internal pressure of any cylinder, whether it is a pipe or water tank, depends very much on its diameter and the pipe being very small in diameter has this very high strength even with threads cut down into it and so on, and with a high enough pressure to burst a pipe it should have burst the [497] pipe it should have burst the tank before it would the pipe. That is the point that I can't avoid making.

Q. Yes, but my question, Professor Daugherty, was this, if you did get steam pressure on the hot water faucet that is an indication that the cold water line was still intact.

A. It might be the case. I am not positive because I haven't gone into the detail of the construction of this heater and everything connected therewith. There may be something else in there that hasn't come to light that I know nothing about.

Q. But in the light of what you have learned and have been asked to assume, you would expect that the cold water line was then intact?

A. I am unable even to guess how this accident occurred, as I said before.

Q. Now, you were told that after Dr. Daniels opened the hot water faucet that water was not

(Testimony of Robert L. Daugherty.)

again obtainable from the hot water faucet until after repairs had been made a day or two later.

A. Yes.

Q. And your conclusion from that would be that the cold water line had been broken? A. Yes.

Q. So that the gist of it is that this line, this [498] cold water line must have broken at or shortly after Dr. Daniels opened the faucet?

A. I am not sure about that at all. It might have been broken before. There could have been something here which hasn't come to light yet.

Q. In the light of the facts as they have been told to you, that must then be the situation?

A. Well, I don't feel that I have gotten all of the facts. Maybe the facts aren't known by anybody.

Q. Well, that could be—

A. I have been trying since I heard about this to formulate some theory as to how this came about and I can't do it.

Q. Now, Professor Daugherty, water at atmospheric pressure, at sea level, boils at about 212 degrees Fahrenheit? A. That is correct.

Q. If that water is put under pressure in an enclosed system the boiling point is increased?

A. Correct.

Q. And if the pressure is suddenly released from water that is heated substantially above 212 degrees that water flashes into steam?

A. That is correct.

Q. And it flashes into steam in some instances with [499] considerable violence?

(Testimony of Robert L. Daugherty.)

A. That is, it may issue from some opening with considerable violence—considerable velocity, yes.

Q. That is, it actually acts as a matter of fact like the geyser at Yellowstone Park. They are comparable in nature. They are of the same type of phenomena, are they not?

A. Well, not exactly that.

Q. Do they not illustrate that principle?

A. Well, the water that comes out of those geysers is a little different. I don't quite see the analogy there but I will agree with you that when pressure is suddenly released on hot water it turns into steam and the steam will issue with a fairly high velocity and—

Q. And that velocity will be converted into kinetic energy? A. That is kinetic energy.

Q. And if something gets in the way of it, it has to move? A. Yes, that is right.

Q. And if that something happens to be water, the steam will attempt to impart velocity to that water? A. Well, all right.

Q. Isn't that just good high school physics?

A. Yes, that is all right, but I still don't see how [500] the application in this particular case results.

Q. Well, now, coming to that—a sudden change in the velocity of water in an enclosed system, it will produce a surge or pressure wave, is that correct?

A. Yes. That is the water hammer that I spoke of, but you have got to have an initial velocity which has been stopped. [501]

ROY L. ELMORE

called as a witness by and on behalf of the defendant, having been heretofore duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Davis): Mr. Elmore, getting to this question of the time of your—that the Hartford Fire Insurance Company was first advised of this matter, you weren't here but Mr. Avery— it was Mr. Avery, wasn't it?

Mr. McCarthy: Yes—no. Yes, the man who signed the policy.

Q. (By Mr. Davis): A member of the firm who signed the policy. It doesn't make any difference and I don't think it is necessary to make a speech to the court. This is not a jury trial.

Mr. Elmore, Mr. Avery mentioned three persons who he spoke to about this, Russel Thomas, Frank Homer, and John Kilgore. Are any of those people—were any of those people employees of the Hartford Fire Insurance Company? [504]

A. Only Mr. John Kilgore.

* * * * *

JOHN KILGORE

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: John Kilgore.

(Testimony of John Kilgore.)

Direct Examination

Q. (By Mr. Davis): What is your occupation, Mr. Kilgore?

A. I am special agent for the Hartford Fire Insurance Company.

Q. When was the first time you ever heard about this incident of the damage to Dr. Daniels' property?

A. Well, Mr. Elmore called me into his office and [505] discussed the matter with me in his office there. That is my first recollection.

Q. When was that?

A. Well, it was in April 1950.

Q. This last April?

After that, later on, did you talk with Mr. Avery about it?

A. Yes, I have talked with him from that time since, to the present time.

Mr. Davis: That is all.

Cross Examination

Q. (By Mr. McCarthy): Haven't you talked to Mr. Avery on many occasions on many subjects?

A. That is true.

Q. And did you see Mr. Avery—you did see Mr. Avery in the month of December 1949, didn't you?

A. Yes, I did. [506]

* * * * *

[Endorsed]: Filed Sept. 10, 1951.

[Endorsed]: No. 13,090. United States Court of Appeals for the Ninth Circuit. Hartford Fire Insurance Company, a corporation, Appellant, vs. Esli H. Daniels and Helen J. Daniels, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: September 11, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit

No. 13090

ESLI H. DANIELS, et al.,

Appellees,

vs.

HARTFORD FIRE INSURANCE COMPANY, a
corporation,

Appellant.

APPELLANT'S STATEMENT OF POINTS

Appellant states the following points upon which it will rely on this appeal:

1. That the occurrence which resulted in the damage to Appellees' property did not constitute a peril such as was insured under the terms of Appellant's policy, to wit, an explosion.

2. That Appellees failed to perform and comply with the conditions precedent in the policy or contract of insurance in that they did not, within the time provided for therein, notify Appellant of claim or file verified Proofs of Loss as required, and said requirements of said contract were not waived by Appellant, nor was Appellant estopped to rely thereon.

Respectfully submitted,

HINDMAN & DAVIS,
/s/ By E. EUGENE DAVIS,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Sep. 21, 1951. Paul P. O'Brien,
Clerk.

No. 13090

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARTFORD FIRE INSURANCE COMPANY, a corporation,
Appellant,

vs.

ESLI H. DANIELS and HELEN J. DANIELS,
Appellees.

BRIEF OF APPELLANT.

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FEB 28 1952

PAUL P. O'BRIEN

CLERK

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No. 13090

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARTFORD FIRE INSURANCE COMPANY, a corporation,
Appellant,

vs.

ESLI H. DANIELS and HELEN J. DANIELS,
Appellees.

BRIEF OF APPELLANT.

Jurisdiction.

This action was commenced in the Superior Court of the State of California, in and for the County of Los Angeles, and removed by appellant to the United States District Court, Southern District of California, on the grounds of diversity of citizenship under Title 28, Section 1441 U. S. C. Said action was within the original jurisdiction of said Court, the amount in controversy being in excess of \$3,000.00 exclusive of interest and costs, the plaintiff being a citizen and resident of the State of California, and the Defendant being a citizen and resident of the State of Connecticut and a non-resident of the State of California. (Title 28, U. S. C., Sec. 1332.)

The cause comes within the usual appellate jurisdiction of this Court upon appeal from final judgment in actions at law as provided in Title 28 U. S. C., Section 1291.

Statement of the Case.

This action is a suit at law wherein Appellees sought and recovered judgment against Appellant in the sum of \$14,450.00 upon an insurance contract.

The undisputed facts show that on December 1, 1948, Appellant executed and delivered to Appellees its contract of insurance effective for three years in the amount of \$10,000.00, subsequently increased to \$15,000.00. The contract was in the form provided by California statutes for fire insurance policies and contained endorsements by which, to quote the language of the policy, Appellant insured Appellees as follows, "the coverage of this policy is extended to include direct loss by * * * explosion, * * *." [Ex. A to Complaint, Tr. pp. 12-16.]

The policy also contained the following statutory provisions:

"When a loss occurs the insured must give this company written notice thereof without unnecessary delay; * * *

"Within sixty days after the commencement of the fire [the word 'explosion' substituted for 'fire' by the endorsement, Tr. 15] the insured shall render to the Company at its main office in California named herein preliminary proof of loss consisting of written statements signed and sworn to by him setting forth" (here follows various matters to be included in said proof). [Tr. p. 13.]

Appellees commenced this action against Appellant to recover upon this contract of insurance, alleging as follows:

“On or about December 19, 1949 plaintiffs suffered direct loss to said property so insured by said policy of insurance caused by perils insured by said policy of insurance. Said direct loss was caused by explosion occurring in said building so insured and from hazards inherent therein, and resulted in the rupture or bursting of water pipe which was a part of the insured building and caused the reinforced concrete slab forming a part of said (10) building to be deformed and cracked and caused the door and window frames, floors and plaster of said building to be cracked, deformed and damaged and by reason thereof said property so insured by said policy of insurance, and plaintiffs were damaged in the sum of \$14,450.00. Said loss and damage was not caused by explosion originating within steam boilers, steam pipes, steam turbines, steam engines or fly wheels and was not caused by explosion, rupture or bursting of steam boilers, steam pipes, steam turbines, steam engines or fly wheels.” [Complaint, Tr. p. 8.]

Appellees also alleged that they had performed all the terms, covenants, and conditions of said insurance policy, as so endorsed, on their part to be performed [Tr. p. 10, fol. 11] and also alleged:

“On or about December 21, 1949, plaintiffs notified defendant of said loss by reporting the same to said

Hamman & Avery, as agent of defendant, and at said time plaintiffs inquired of said agent as to whether or not any action was required of plaintiffs under said policy of insurance. Said Hamman & Avery, acting as agent for defendant, at said time, informed plaintiffs that said loss was not covered by said insurance policy and that defendant was not obligated, under the terms of said policy of insurance, to indemnify plaintiffs for said loss or any part thereof. Plaintiffs believed and relied upon said statement of said Hamman & Avery and believing and relying thereon, plaintiffs refrained from filing Proof of Loss under said policy of insurance or taking any further action thereon until after the expiration of more than sixty days after December 19, 1949. Plaintiffs did not discover that said loss was covered by said policy of insurance until after the expiration of more than sixty days after said loss." [Tr. p. 9.]

On issues joined on these allegations trial was had and the Court made findings and conclusions and rendered judgment against Appellant in the amount of \$14,-450.00, with interest and costs. [Tr. p. 30, fol. 31; p. 37, fol. 39.]

Appellant filed notice of appeal to this Court within the statutory time. [Tr. p. 37, fol. 39.]

Appellant presents this appeal upon the premise that the undisputed facts established that there was no direct loss to the property insured caused by explosion, and that Appellees failed to perform the conditions precedent of said contract of insurance.

Summary of Facts.

At the time in question, Appellees were the owners of a newly constructed bungalow in the Ranch Los Palos Verdes, Los Angeles County, California, being the building described in the policy of insurance. This was a one-story, rambling, bungalow-type of building of about nine rooms and three bathrooms, and had been completed and occupied only a few months before the event which gave rise to this suit occurred. It was built over adobe soil on a cement slab with wooden frame covered by redwood. Roughly, the house was constructed first by pouring the perimeter walls, then grading within, next placing crushed rock, either in or on top of which the water system was laid, then placed unsealed building paper over the crushed rock and then pouring the concrete slab. In the concrete slab were imbedded copper coils for the purpose of providing a radiant heating system, and over this slab was laid the oak flooring of the house, and underneath certain of the oak flooring were also layers of pipe, for radiant heat, on top of the slab.

The house was served by one main water supply and the water came into the house from a main supply through a reduction valve which reduced the pressure to around 45 pounds. The water came into the house through water softener tanks and the particular portion of the system involved here continued thence in a straight line for a distance of approximately twenty feet to a T joint and beyond. At the T joint, at right angles, the water pipe continued for about ten feet to a hot water heater. This pipe was a $\frac{3}{4}$ inch wrought iron galvanized pipe and was laid on or in the crushed rock, over which crushed rock there was layed a paper membrane and over that the slab poured. [Pltf. Ex. 1, Tr. pp. 45-46, 72-82.]

There were two other hot water heaters in the house, one for heating domestic water and which is not involved here, and one for heating the water supply for the radiant heat.

On Sunday morning, December 19, 1949, at about 7:00 A. M. Appellee Esli Daniels was awakened in his bedroom, about fifty or seventy-five feet from the hot water heater just mentioned, by an unusual noise in the boiler room housing this heater. [Tr. p. 49, fol. 9.] He ran to the heater room where the radiant heat and water boilers were and the water boiler was going full blast and making an unusual noise, a noise hard to describe but very similar to that that you hear in your car radiator when your car is overheated. It was a type of noise like that. [Tr. p. 50, fol. 10.]

The gas burner under the hot water heater was burning very vigorously and he turned the gas off. [Tr. p. 50, fol. 10.]

He immediately went into the bathroom adjacent and turned on the hot water tap there. Steam came out with a lot of pressure, enough pressure to blow out a little copper strip that was in the faucet to prevent splashing. He then went into the kitchen and turned that hot water line on and steam also came out of that and a little water. [Tr. p. 51, fol. 11.]

The steam did not issue from the hot water faucet in the bathroom very long, the witness would guess ten minutes, but didn't know, maybe it was only two or three, but it wasn't very long, just a short time. After that no water came at all from the hot water faucet. [Tr. p. 52, fol. 12.] The witness concluded the thermostat on the hot water heater wasn't working because the water was overheating. [Tr. p. 53, fol. 14.]

On Sunday night they heard a noise that sounded like one of the outside water taps was running; just like water was running someplace in the house and they couldn't find it. [Tr. p. 74, fol. 49.]

All this occurring on Sunday, no plumber came until about three or four o'clock Monday afternoon, December 20th. The plumber then turned the water off and removed the water softeners because it sounded like water was running in the water softener and there was water on the floor around the water softener. [Tr. p. 55, fol. 16.]

On Tuesday, December 21st, plumbers came to the house, located the difficulty, which was found to be a break in the $\frac{3}{4}$ inch wrought iron, galvanized water line at the T joint where the line took off at right angles to convey cold water to the hot water heater about ten feet distant. [Pltf. Ex. 1, Tr. p. 81, fol. 73.] This break was at the threaded portion of the pipe where the pipe entered the T joint and was in the last engaged thread in the fitting. It was a square break, as reasonably as could be made on a piece of pipe, and there was between the ends of the pipe about an eighth or a quarter of an inch separation. [Tr. p. 81, fol. 74.] The two broken ends of the pipe were in opposition but seemed to be slightly out of alignment. [Tr. p. 85, fol. 107.] The break was at right angles along the angle with the thread and was a clean break, but not like you would cut it with a saw. There was a slight amount of jaggedness that you would find if a pipe was broken, but there was no undue amount of jaggedness. It appeared to be an ordinary break that you would find in any threads. [Tr. p. 87, fols. 108-109; p. 141, fol. 372.]

This break was repaired by putting in an expansion swing joint and the Appellees' water service reestablished.

Following the reestablishment of services and within twenty-four or forty-eight hours thereafter, damage began to appear in Appellees' house. They first noticed steam causing the floors to swell and buckle and then distortion of the slab which resulted in general distortion throughout the place. The steam was caused by the dampness introduced in the flooring from the water that had been flowing under the house from Sunday morning until Monday afternoon and the heating from the radiant heating unit producing steam and also from the swelling of the adobe soil under the crushed rock and concrete slab.

None of the foregoing facts are in dispute and the foregoing statement, we believe, constitutes a recitation of all of the material testimony relating to the happening which Appellees claimed constituted the direct loss by explosion provided for in the policy.

The only dispute in the case came, as is usual, in the opinion of experts. Appellees produced one expert who deduced from the foregoing facts the conclusion that when the Appellee opened the hot water tap it produced the phenomena known as "water hammer" and the force of this phenomena broke the pipe in the manner described by the witness.

Appellant produced a number of highly qualified experts who testified that the break in the pipe could not have been caused by internal pressure or by water hammer and all of whom concluded that the break in the pipe occurred through external tension, probably due to the swelling of the adobe soil due to recent heavy rains. However, the District Court, as a trier of fact, having found and concluded that the break of the pipe was caused

by internal pressure, Appellant fears that it is concluded by this finding and will discuss this phase no further, but direct ourselves to the presentation of the proposition that the occurrence and resulting damage was not direct loss by explosion.

Following the occurrence and the damage, Appellees failed to give Appellant written notice thereof without unnecessary delay and failed to comply with the policy conditions by rendering sworn proof of loss within sixty days after the commencement of the loss, not notifying Appellant of any claim until April of 1950 and not filing a proof of loss until July 31, 1950. The Court found a compliance with all the conditions of the policy, which finding obviously was erroneous, and also found a waiver thereof. As to the question of waiver, we believe the facts from which waiver was claimed can better be presented in the argument than in the summary.

Specifications of Error.

1. The Court erred in deciding and finding that Appellees suffered direct loss to their property by explosion occurring in the building insured.

2. The Court erred in finding that Appellees had performed all the terms, covenants and conditions of said policy on their part to be performed.

3. The Court erred in impliedly finding that the Appellant had waived performance by Appellees of the conditions precedent above referred to.

ARGUMENT.

The fundamental proposition involved herein is whether there was a direct loss by explosion.

Appellees sued Appellant upon a written instrument, the only condition of which they contend authorizes them to recover is the insurance of Appellees by Appellant against a direct loss by explosion. Appellant submits that there is absolutely no testimony, either direct or theoretical, by which these undisputed facts can be tortured into making the event that occurred an explosion.

There is no place for construction of this contract. The language is of the simplest. "The coverage of the policy is extended to include direct loss by * * * explosion * * *." In applying the word "explosion" to a set of facts, the word is to be taken as understood by an ordinary person in its ordinary and popular sense.

In the case of *Roma Wine Company, Inc. v. Hardware Mutual Fire Ins. Co.*, 31 Cal. App. 2d 455, 88 P. 2d 260, the Court said:

"In *New Hampshire Fire Ins. Co. v. Rupard*, 187 Ky. 671 (220 S. W. 538), it is said:

"The appellants insist that all the evidence is to the effect that the inflammable gas in the room was ignited by the flames of the match, and that its burning therein for a short space of time before the noise and effect of the explosion occurred was only a part of the explosion, and hence that the burning of the floor, fixtures, papers, boxes, and clothing before the culmination of the explosion was a fire subsequent, and not antecedent, to the explosion. However well this theory may accord with scientific principles as applied to such an occurrence, it is not in accord with the commonly accepted opinion of what

constitutes an explosion. Ordinary people other than scientists would hold that the explosion occurred when the sudden expansion took place which wrecked the building, accompanied by a more or less loud report. In *Mitchell v. Potomac Ins. Co.*, *supra* (183 U. S. 42 (22 Sup. Ct. 22, 46 L. Ed. 74)), the word "explosion" as used in an insurance policy was defined to be what ordinary men, not scientists, understood an explosion to be, and this view of what the term in a policy of insurance is intended to mean is concurred in generally.'

"In *Mitchell v. Potomac Ins. Co.*, 183 U. S. 42 (22 Sup. Ct. 22, 46 L. Ed. 74), the court said:

" "When the word 'explosion' was used in the policy, the company as ordinary men, . . . and the party insured as an ordinary man, are presumed to have understood the word 'explosion' in its ordinary and popular sense. Not what some scientific man would define to be an explosion, but what the ordinary man would understand to be meant by that word." " "

The foregoing cited case is the only California case where we have found a decision on what constitutes an explosion. There have been numerous expressions from other courts and dictionaries, all more or less to the same effect.

Hartford Fire Ins. Co. v. Empire Coal Min. Co., 30 F. 2d 794, follows the rule laid down in the above-quoted case, and quotes the various definitions as follows:

"The term 'explosion' has a varied meaning. Webster's Dictionary defines it as 'a violent bursting or expansion, with noise, following the sudden pro-

duction of great pressure, as in the case of explosives, or a sudden release of pressure, as in the disruption of a steam boiler.'

"Century Dictionary defines it as 'a sudden expansion of a substance, as gunpowder or an elastic fluid, with force and usually a loud report; a sudden and loud discharge.'

"The New English Dictionary (Oxford) gives this definition, 'of a gas, gunpowder, etc.: the action of "going off" with a loud noise under the influence of suddenly developed internal energy.'

"In *United Life, Fire & Marine Ins. Co. v. Foote*, 22 Ohio St. 340, 348, 10 Am. Rep. 735, it was said: 'An explosion may be described generally, as a sudden and rapid combustion, causing violent expansion of the air, and accompanied by a report. But the rapidity of the combustion, the violence of the expansion, and the vehemence of the report, vary in intensity as often as the occurrences multiply. Hence, an explosion is an idea of degrees, and the true meaning of the word, in each particular case, must be settled, not by any fixed standard, or accurate measurement, but by the common experience and motions of men in matters of that sort.'

"In *Trans. F. Ins. Co. v. Dorsey*, 56 Md. 70, 81, 40 Am. Rep. 403, it was said: 'An explosion produced by ignition, according to common understanding, may be accurately enough described, for practical purposes, as a sudden and rapid combustion, causing a violent expansion of the air, and producing a report more or less loud, according to the resistance offered. That it greatly varies in its degrees of violence, and the effects produced, are facts fully within the experience of every one. We must suppose that the

term was employed in the policy in its ordinary and popular meaning.'

"In *Michell v. Potomac Ins. Co.*, 16 App. D. C. 241, 270, it was said, quoting from the *Dorsey Case*, *supra*: '* * * An explosion * * * according to common understanding, may be accurately enough described for the practical purposes as a sudden and rapid combustion causing a violent expansion of the air and producing a report more or less loud.'"

Applying the true meaning of the word "explosion" as used in the contract of insurance to the undisputed facts, we find that the breaking of the water pipe had not a single one of the elements of an explosion as is ordinarily understood and applied.

No noise was heard other than a noise like the hissing of steam in the hot water boiler. No shattering occurred, the pipe breaking off sheer and at right angles as would be the case under any ordinary tension. There was no sudden expansion of any substance, as the witnesses testified that water is incompressible. There was no violent expansion of air or of any other substance. There was no report at all, either loud or otherwise.

If we accept the theory of Appellees' one expert that the opening of the hot water tap produced a water hammer and this water hammer broke the pipe, we have then only the effect of a hammer, which pounding on the T joint broke the pipe which was broken at right angles sheer with no fragmentation or shattering such as must be present in an explosion. No one would contend that if the pipe had been subjected to a pounding by a hammer, water or otherwise, that this would be an explosion.

If we test these facts by the definitions announced in the foregoing cited cases and apply the word explosion in the ordinary and accepted sense used by ordinary men in their ordinary nomenclature, as is the rule, it would seem that a very fair test of whether or not this series of events constituted an explosion would be found in the very fact that, although, Appellees, their friends, and advisors, were fully aware of all the facts and circumstances surrounding the occurrence on December 19, 1949, and immediately thereafter, none of them considered that there had been an explosion.

It was not until April, 1950, when Appellees' attention was called to the case of *Olds Seed Company v. Commercial Union Assurance Company*, hereinafter discussed, that Appellees gave Appellant notice that they had sustained a loss by explosion and immediately got busy to shape their case within the terms of the *Olds* case, and it was not until July 31, 1950, more than six months after the alleged loss, that they served sworn proofs of loss upon Appellant as required by their contract.

Appellees relied upon, and will no doubt rely upon in this Court, the case of *Olds Seed Company v. Commercial Union Assurance Company*, 175 F. 2d 472 (C. C. A. 7th).

This case is the only case Appellants have found and we believe it is the only case in existence where an alleged explosion had occurred in a water pipe and this case goes to the extreme limit. It must be pointed out that that case was a jury trial and no exceptions were taken to the

instructions given by the Court regarding explosions, and that the Appellate Court indicated, although not deciding, that as triers of fact they perhaps would have come to a different conclusion when they said, on page 474,

“The question before us is not what conclusions we would have reached from the evidence, had we been members of the jury.”

The facts in the present case, however, do not bring themselves at all within the facts of the *Olds* case, or within any of the definitions or conceptions of the meaning of explosion as defined therein, or in any of the other cases or dictionaries which we have been able to find. In the *Olds* case the conclusion was drawn that there was an explosion from the condition of the pipe. In that case the pipe was found to have a jagged edged break about two and a half inches in length along the longitudinal axis of the pipe and the sides of the break were about half an inch apart at the widest point of separation. In the present case the pipe was not shattered, jagged edged, or broken longitudinally, but was a sheer, clean break at the last thread joining it to the T. In the *Olds* case, the presumed explosion occurred at a time when no one was present to hear the report of the explosion, a report being one of the essential ingredients of an explosion. In our instant case, Appellee, Esli Daniels, and his son were both in the immediate vicinity of where the pipe broke and heard no report or other sounds other than the sound like the escaping of steam in an automobile radiator.

Appellant submits that this is a case where the minds of men cannot reasonably disagree on the conclusions to be drawn from the facts and where the facts are wholly undisputed and that the trial court erroneously concluded that the break in the water pipe, an explosion and the damage to Appellees' property was direct loss by explosion.

Assuming, for the sake of argument, that the break in the pipe was caused by explosion, the damage did not arise direct from that. This was only a remote cause of the loss. When the pipe broke, nothing in the way of damage occurred. Nothing happened except that water commenced to seep in under the slab floor and dampen the concrete so that when the radiant heater heated up the house, the moisture and steam took effect and later when the adobe soil commenced to swell from the presence of water it rose and buckled the concrete slab and thereby distorted and damaged the house. Had Appellees turned off the water within a reasonable time after the pipe broke there would have been no damage other than a little moisture under the house. The breaking of the pipe was only a remote cause of the loss.

“An insurer is liable for a loss of which the peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.”

Cal. Insurance Code, Sec. 530.

Error of the Court in Making Findings VIII, IX, and XII, Finding in One Paragraph That Appellees Had Performed the Conditions Precedent and in the Others Impliedly Finding a Waiver Thereof.

The contract of insurance sued upon herein contains the following statutory provisions:

“DUTY OF INSURED IN CASE OF LOSS. When a loss occurs the insured must give to this company *written notice thereof without unnecessary delay*;
* * *

“Within sixty days after the commencement of the fire the insured shall render to the company *at its main office in California named herein* preliminary proof of loss consisting of a *written* statement signed and sworn to by him setting forth:—(here follows eight specifications of matters required). * * *

“No suit or action on this policy for the recovery of any claim shall be sustained, *until after full compliance by the insured with all of the foregoing requirements*, nor unless begun within fifteen months next after the commencement of the fire.” [Italics ours; Tr. p. 13.]

The rule in this jurisdiction, and by the great weight of authority elsewhere, is and always has been that where a contract of insurance contains the provisions quoted above, that the performance of those conditions are, unless waived, conditions precedent to the right of maintaining an action and that a plaintiff cannot recover unless he can show that he has performed the conditions in the manner and within the time provided. This rests upon the fundamental proposition that a party suing upon an agreement must bring himself within the terms of the

agreement, and show that he has performed the conditions of the agreement upon his part agreed to be performed.

Imperial Fire Insurance Co. v. Coos County, 151
U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231.

The leading case in California involving the direct proposition of the furnishing of proofs of loss within sixty days after the loss is the case of *White v. Home Mutual Ins. Co.*, 128 Cal. 131, 60 Pac. 666. This case frequently has been cited and followed and has never been overruled. On pages 135 and 136 of 128 Cal. (pp. 66-67 of 60 Pac.) the Court lays down the rule as follows:

“The policy by direct words says proofs of loss must be furnished within sixty days from the date of the fire. This is the contract between the parties. The period of time provided allows ample opportunity to do the work, and the provision is a most reasonable one. If this requirement of the contract is binding to any extent, if it is binding upon the insured to furnish the proofs of loss, then why is it not equally binding upon him to furnish proofs within sixty days? Why should one provision of the requirements be given effect, and not the other? It is not for this court to say that the one provision holds any more of substances than the other. It is conceded by the Michigan court in all its cases that the proofs must be furnished before the action can be brought, and it seems equally clear that they should be furnished within the time specified, or likewise action cannot be brought. As the court has already shown, the great weight of authority is in direct line with these views. The contract is, that the action cannot be brought until after a full compliance by

the insured with all the foregoing requirements. One of these requirements demanded the insured to furnish proofs of loss within sixty days from the date of the fire. At the time this complaint was filed the insured had not complied with this requirement of the contract, and the sixty days had long since gone by.

“The court instructed the jury as follows: ‘The matter for the jury to determine in settling the question as to the right of the defendant to claim the loss of the insurance upon the ground that the proofs were not presented is, Were these proofs presented within a reasonable time, the reasonableness of the time to be determined by all the facts and circumstances of the case? If you find that under these facts and circumstances proofs were made within a reasonable time to the insurance company, then it is your duty generally to find in favor of the plaintiffs.’ In view of what has been said, this instruction is wrong.”

The *White* case was followed by Judge Van Fleet in the District Court, Northern District of California, in the case of *San Francisco Savings Union v. Western Assur. Co. of Toronto*, 157 Fed. 695, where the court held, copying the syllabus:

“INSURANCE—CONDITIONS IN POLICY—TIME FOR PROVING LOSS.

“Where an insurance contract contained a condition printed on the back of the policy that ‘no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the

foregoing requirements,' and among such requirements was one that proof of loss should 'be made within sixty days after the fire unless such time is extended in writing,' a complaint on the policy does not state a cause of action which shows on its face that proof of loss was not made until six months after the fire, and alleges no extension of time nor waiver."

The Court said, on page 697:

"These principles are applicable alike to all the conditions of the contract, whether those conditions affect the risk itself or relate merely to the mode of establishing the loss; and, applying them here, it is obvious that the limitation of time in the clause as to the making of proof of loss is as essential to the integrity of the contract the parties have made as the requirement that proof be made at all; and that, if that feature may be disregarded, the entire clause may with equal right be ignored, something which no court thus far has ever undertaken to hold."

And on page 698 referred to the *White* case as follows:

"The Supreme Court of the state of California, in a quite recent case (*White v. Home Mutual Ins. Co.*, 128 Cal. 131, 135, 60 Pac. 666) involving the same provision, where proof of loss was not made until some four months after the fire, reached the same conclusion, and in a well-reasoned opinion holds that the provision is a condition precedent, the performance of which by the plaintiff is indispensable to the right of recovery, that by the language employed time is intended to be of the essence of the contract, and that there is no right in the court to dispense with the condition or excuse the nonperformance of it."

The Court then quotes from the *White* case the portions we have quoted above.

The *White* case was followed in the following cases and is unquestionably the rule in California:

Seccombe v. Glens Falls Insurance Co., 45 Cal. App. 611, 188 Pac. 305;

Kohner v. National Surety Co., 105 Cal. App. 430, 287 Pac. 510;

Harris v. North British & Mercantile Ins. Co., Ltd., 30 F. 2d 94 (5th C. C. A.).

There is no question or controversy on the proposition that Appellees did not perform these conditions precedent on their part agreed to be performed. The complaint alleges it and the Court so found. The allegations of the complaint and the exhibits attached thereto conclusively bear this out. [Par. X, Tr. p. 34, Ex. A, Tr. p. 18.]

There is no direct evidence of any waiver of the performance of these conditions. The trial court implied a waiver from an implied denial of liability by Appellant's local agent prior to the expiration of the time for giving notice and furnishing proofs of loss. The evidence regarding this implied waiver was received over Appellant's objections that no proof of authority on the part of the agent to deny liability was shown and further that the undisputed testimony showed that there had been no denial of liability for loss by explosion in that no one of the parties interested had even considered the happening as an explosion. [Tr. p. 65.]

The whole matter of this alleged waiver rests on certain conversations had with a Mr. Avery, the local agent of

Appellant who had executed and delivered the policy to Appellees, and the evidence was received over Appellant's objection that no authority had been shown and none was shown of Mr. Avery to waive any of the conditions of the policy and no waiver was shown.

To properly present this phase, we must quote all of the material testimony regarding these conversations.

The first of the conversations with the Agent was testified to by Mr. Kenneth S. Wing, Appellees' architect, who with his partner jointly owned and occupied an office building with Mr. Avery. [Tr. p. 137, fol. 363.]

Mr. Wing, called by Appellees, after testifying to having received from Appellees the notice of the breaking of the pipe, proceeded as follows:

"Q. Now following the occurrence of this break in the line, did you have any conversation with Mr. Robert Avery? A. Following the break of the line?

Q. Yes. A. Yes, I did, within a very few days after that. I discussed it with him.

Q. And who is Mr. Robert Avery? A. He is one of the partners—in fact, I discussed it with both Hammond and Avery who are the firm of Hammond & Avery Insurance Agents, with whom the Doctor placed the policy.

Q. And who were present when you had this conversation with Mr. Avery? A. Mr. Hammond and Mr. Avery.

Q. Both of them were there? A. Yes, sir.

Q. And what was said?

Mr. Davis: Again I make my original objection that conversation had with these gentlemen would not be binding upon the company unless the agent's authority has first been shown.

The Court: That is one of the questions we have to settle here.

Mr. McCarthy: Yes, your Honor, that is right.

The Court: It will be admitted subject to objection to strike.

Mr. McCarthy: Thank you, your Honor.

Mr. Davis: Same objection I made yesterday, that your Honor reserved ruling on.

Q. (By Mr. McCarthy): Will you state that conversation?

A. I asked them if their comprehensive clause, as I understood it, would not cover this and they said that they would check and they talked, as I remember it, with the Los Angeles office.

Mr. Davis: I object to that.

The Court: What did they tell you?

The Witness: They said that it did not.

The Court: Did they say they had checked with Los Angeles?

The Witness: Yes, sir.

Q. (By Mr. McCarthy): Now, did you tell them what happened? A. Oh, yes.

Q. Describe what you told them.

A. Well, I told them that the water line had broken under the building and caused a considerable amount of water to go underneath the building, necessarily swelling the adobe, which is common procedure.

The Court: Did you tell what caused the break in the line?

The Witness: Yes, I told them, which I felt at that time, that it was the thermostat on the water heater. I think that was the beginning point of all of it.

Q. (By Mr. McCarthy): You told them about the failure of the thermostat? A. Yes.

Q. Did you say anything about the formation of steam? A. No, I did not. I did not get into any technical discussion with them to that extent. I told them the pressure was built up due to the fact that the thermostat didn't release." [Tr. pp. 111-113, fols. 216-218.]

Appellant Esli Daniels testified, over Appellant's objection [Tr. p. 65], to conversation had with Robert Avery within a week after the occurrence as follows:

"A. It was a telephone conversation.

Q. And what was said? A. Well, I called him up and I said: 'Bob, I think that I had better increase my insurance, seeing what has happened out here. I am afraid the place is going to burn down next,' and I said—well, I started—first I started to tell him what had happened.

The Court: What did you tell him?

The Witness: I told him that the water heater had stuck and that the damage is very severe and he said: 'Well, I know about that,' he said, 'because Kenneth Wing had been in to see me and see whether you are covered on this,' and I said: 'Well, I am not covered.' He said: 'No.' He said: 'No, your policy does not cover anything like that,' and then is when I said: 'Well, I had better take out more insurance anyway because I am afraid the place is going to burn down next.'

Q. And did you subsequently take out— A. Yes, sir, I doubled the policy.

Q. And did you believe what Mr. Avery told you, that it was not covered by the policy? A. Surely.

Q. And because of that you refrained from filing proof of loss under the policy? A. Yes.

Q. When did you first discover that it was covered by the policy? A. Well, it was several months later. I don't know the exact date. It was quite a while later that Bob Avery or Clay Hammond, or one of the two, wrote us a note to the effect that there had been a similar case to ours and it was just a recent one and that the insured had been able to collect. And he said—I think he said: 'I think you are covered.'

Q. But that was more than 60 days after the occurrence? A. Yes, that was considerable after 60 days.

The Court: Then what did you do?

The Witness: Then I immediately got to work on the thing and called Mr. Ekdale or talked to him about it and he seemed—

The Court: Then did you file your claim, your proof of loss?

The Witness: Very shortly after that, yes, sir.

The Court: Where did you get your form for the proof of loss?

The Witness: Mr. McCarthy took care of that for me.

Q. (By Mr. McCarthy): And that was filed with the Hartford Fire Insurance Company in San Francisco? A. Yes, sir." [Tr. pp. 67-68, fols. 29-30.]

Mr. Robert Avery, again over Appellant's objections, testified as follows:

"Q. (By Mr. McCarthy): What is your occupation, Mr. Avery? A. Insurance agent.

Q. And you are agent for the Hartford Fire Insurance Company? A. Yes.

Q. Now, where is your place of business? A. No. 30 Linden in Long Beach.

Q. And are you acquainted with Dr. Daniels, the plaintiff in this case? A. Yes.

Q. And with Kenneth Wing, the architect? A. Yes.

Q. Mr. Wing's offices are adjacent to yours, in the same building? A. They are upstairs in the same building.

Q. Now, inviting your attention to a date within a few days after December 18, 1949, did you have a conversation with Mr. Kenneth Wing regarding the Daniels' house? A. Yes, I did.

Q. And who were present? A. I think I was the only one present at that time.

Q. And what was said?

Mr. Davis: Of course I am making the same objection as I did before.

The Court: Same ruling.

The Witness: Mr. Wing told me of the damage caused to Dr. Daniels' house as a result of failure of some of the plumbing, resulting in water damage.

Q. (By Mr. McCarthy): Now, just what did he tell you? Did he say any more than that? A. Well, he said that he thought that it was a condition in the thermostat at that time as I remember it.

Q. And what did he say about the thermostat? A. Well, as I recall the conversation he said that the thermostat had apparently given way to pressure and broken, permitting the water to seep in and under the house.

Q. And what else was said in that conversation? A. The conversation was largely as to the extent

of the damage to the house and some query on his part as to whether Dr. Daniels' fire insurance policy would cover the damage.

Q. Now, were you familiar with Dr. Daniels' fire insurance policy? A. Yes.

Q. And what was your reply? A. The reply was that he did not have coverage for water damage.

Q. And was anything further said about it? A. No, I don't believe so.

Q. Now, did you make any report to anyone connected with the Hartford Fire Insurance Company regarding this matter? A. Not directly at that particular time. At a later date, oh, within two weeks it was discussed rather thoroughly with John Kilgore, who was a special agent for the Hartford Fire Insurance Company and it was also discussed at some length with Russell Thomas, who was an adjuster for the Hartford Accident and Indemnity Company and also with Mr. Frank Homer, who was a special agent for the Hartford Accident and Indemnity Company.

Q. Now, did you at or about the same date have any conversation with Dr. Daniels? A. Yes. Dr. Daniels called me on the phone to inquire if he had coverage for water damage and started to tell me of the extent of the damage, and I told him that I had already discussed it quite thoroughly with Kenneth Wing, the architect, and I gave him the same answer, that he did not have coverage for water damage.

Mr. McCarthy: You may cross-examine.

Q. (By Mr. Davis): When was that that Dr. Daniels called you? A. As I recall it was the 21st of December. The reason that date fixes itself in

my memory was because my mother's brother passed away on that date in Missouri.

Q. Are you and Mr. Wing—you and Mr. Wing are engaged in some enterprises together? A. The only enterprise we are engaged in is that Mr. Wing and myself and Mr. Hammond each own a third interest in the building in which we are located.

Q. Dr. Daniels is not interested with you? A. No, sir.

Q. You are a friend of Dr. Daniels? A. Yes, sir.

Q. And have been procuring his insurance for him over a period of time? A. That is right.

Mr. Davis: I think that is all, Mr. Avery.

The Court: Just a moment. I believe the architect said something about you having made some inquiry over the telephone as to whether this was covered. Do you recall anything about that? Did you check with somebody to find out whether he was covered or not?

The Witness: I don't believe that I did, sir. The question that Dr. Daniels and Mr. Wing asked us at the time as whether or not the policy covered water damage and it definitely does not as water damage.

The Court: Did he tell you in substance—well, he told you in substance and effect the break in the pipe was caused by the excessive heat from the water heater?

The Witness: That is right.

The Court: But nevertheless you gave him that answer and you knew that he was claiming it was a break which came as a result of the thermostat failing to work and not the hot water heater itself?

The Witness: That is right.

The Court: That is, you had that information?

The Witness: That is right.

The Court: That is all.

Q. (By Mr. Davis): As I understood, you got the impression from Mr. Wing that the thermostat had failed and the water had leaked under the house?

A. That is correct.

Q. You didn't have any knowledge that there was a break of the pipe under the house? A. No, sir.

Q. At that time? A. No, sir.

The Court: Another question. Afterwards did you call Mr. Daniels' attention to the fact that he may have been covered by the policy?

The Witness: Yes, we did. We subscribed to a service called the 'F. C. & S. Bulletins' which provide us with monthly written reports of the changes in various types of insurance and also gives résumés of cases which have been decided on court points, and in the April issue of that service was a résumé of a case which was very similar to Dr. Daniels' case and when he had read that and discussed it we called Dr. Daniels and told him of the circumstances and suggested that he should file a claim as a result of that.

The Court: And did he file a claim?

The Witness: That is correct.

The Court: That is all.

Q. (By Mr. Davis): It was after that that he notified the Hartford Fire Insurance Company of the claim? A. That is right.

The Court: Are you what is called a general insurance agent?

The Witness: Yes, sir.

The Court: Representing many fire insurance companies?

The Witness: Yes, sir.

Mr. McCarthy: One further question.

Redirect Examination.

Q. (By Mr. McCarthy): As a part of your duty has the Hartford Fire Insurance Company instructed you to report to it any claims of which you acquire knowledge? A. Yes, sir." [Tr. pp. 134-139.]

Mr. Roy O. Elmore testified that he was Southern California Manager for Appellant and as such that all losses and underwriting was under his control and jurisdiction, and that the first time that this alleged loss, or the subject of the lawsuit, was reported to him or his office was on April 19, 1950, when it was reported by their agents at Long Beach, Hamman and Avery, to his claims department. [Tr. p. 120.]

On the foregoing testimony the trial court concluded that the Appellant had waived the performance of the conditions precedent by denying liability before the time for performance arrived.

That this was error is obvious. All of the testimony went in over the objection of Appellant that no authority in Mr. Avery to deny liability or waive the conditions had been shown, and furthermore there was absolutely no testimony that any claim to be denied had been made, or that Mr. Avery, the agent, knew of any claim for direct loss by explosion. In fact, none of the parties

conceived that there was an explosion until the *Olds* case was brought to their attention and they conjured up an explosion thereafter.

The only authority shown in Mr. Avery was that he was the agent who had countersigned and delivered the policy and that he was instructed by the Appellant to report all losses to it. The Court assumed his authority by reason of these facts.

It is fundamental that one seeking to hold a principal through the acts of his agent has the burden of showing not only that the party was an agent, but also the scope and extent of his authority.

This rule is epitomized in the following quotation from *Hill v. Citizens National Trust & Savings Bank*, 9 Cal. 2d 172, 69 Pac. 853, as follows:

“A third person, such as appellant, is not compelled to deal with an agent, but if he does so, he must take the risk. He takes the risk not only of ascertaining whether the person with whom he is dealing is the agent, but also of ascertaining the scope of his powers. The rule is cogently stated in 1 Mechem on Agency, second edition, section 743, page 527, as follows: ‘An assumption of authority to act as agents for another of itself challenges inquiry. Like a railroad crossing, it should be in itself a sign of danger and suggest the duty to “stop, look and listen.” It is therefor declared to be a fundamental rule, never to be lost sight of and not easily to be overestimated, that persons dealing with an assumed agent, whether the assumed agency be a *general* or *special* one, are bound at their peril, if they would hold the principal, to ascertain not only the fact of the agency *but the nature and extent of the authority*, and in case either is contro-

verted, the burden of proof is upon them to establish it.' ” (*Ernst v. Searle*, 218 Cal. 233, 240, 22 P. 2d 715, 717.) (Italics ours.)

And, of course, the general rules of agency is as applicable to insurance as to any other matter.

14 *Cal. Jur.* 454.

It is said in 45 *Corpus Juris Secundum* 624:

“An insurance company may be estopped to deny liability, or a ground for forfeiture or avoidance of the policy may be waived, by the acts and statements of an *authorized* officer or agent of the company, but the acts constituting a waiver on estoppel must be those of an officer or agent whose acts under the circumstances are binding on the company.” (Citing *Alexander v. General Ins. Co.*, 22 Fed. Supp. 157 (S. D. Calif.); *Rice v. Calif. Western States Life Ins. Co.*, 21 Cal. App. 2d 660, 70 P. 2d 516; *Kugler v. I. A. C. of State of Calif.*, 63 Cal. App. 308, 218 Pac. 472.)

And in 45 *Corpus Juris Secundum* 626:

“But to bind the company the acts or representations must have been made by a person acting as an agent of the company within the real or apparent scope of his authority. *It is not every agent of insurer, however, who may waive important contract provisions.*”

And in 46 *Corpus Juris Secundum* 284:

“Such waiver cannot be made by an unauthorized agent.”

There was absolutely no testimony of any direct authority in Mr. Avery to deny liability or waive the terms of the policy and the whole testimony shows that he did not do so or attempt to do so. He was never asked to accept or deny a claim or to take any action in reference to the loss. He was not advised that there was any indicia or claim of explosion and the most that was asked of him was an interpretation of the policy and, as Appellee Esli Daniels says, to find out whether his fire policy covered this loss. It was not competent for Mr. Avery to attempt to interpret the contract contrary to its express conditions.

See:

United Pacific Insurance Co. v. Northwestern National Ins. Co., 185 F. 2d 443.

The Appellees, having their policy contract, were presumed to know its unambiguous terms and cannot be heard to say that they did not read it or understand it.

Madsen v. Maryland Casualty Co., 168 Cal. 204, 142 Pac. 51;

Kahn v. Royal Indemnity Co., 39 Cal. App. 180, 178 Pac. 331.

Since there was no proof of any express authority in Mr. Avery, what was said in the case of *Blair v. National Reserve Ins. Co.*, 293 Mass. 86, 199 N. E. 337, becomes particularly pertinent. The Court said:

“And when the assertion is made that a condition in a policy inserted for the company's benefit has been waived or destroyed by the company in some way other than that required by the policy, it becomes necessary to show that the acting agent had author-

ity to bind the company in ways contrary to those contemplated by the contract. As the probabilities will be against such grant of authority, definite proof will be required. Authority to make the original contract or to waive the condition in the manner prescribed therein is not enough. If this were not so, the particular requirements of the contract would become meaningless. Some further and additional delegation of authority derived from the fountain head of corporate power must be shown broad enough to include the abrogation of the condition in a manner excluded by the very terms of the contract itself." (Citing many cases including U. S. Supreme Court.)

In *Westerfeld v. New York Life Ins. Co.*, 129 Cal. 68, 61 Pac. 670, the Court said:

"It is also said that whether a particular agent has power to waive conditions is a question of fact. Plaintiffs offered no evidence as to the authority of Hawes except the policy, which expressly denied to him the authority to modify the contract. The burden was upon plaintiffs. The title 'general manager,' for a specified territory, does not establish the particular authority required, especially after this express limitation."

Since there was shown no actual authority on the part of Mr. Avery to waive the conditions precedent in the policy, resort was had to an implied authority arising from the fact that he was the local agent of the Appellant and authorized to countersign and deliver policies. We have found no cases holding that such an authority implies authority to act after a loss and to waive conditions precedent to be performed by the Assured, but on the contrary have found many cases holding such implied authority does not exist.

See:

Collins v. Home Ins. Co. of New York, 167 Atl. 621 (Pa.);

Fernando v. Milwaukee Mechanics Ins. Co., 142 Pac. 693 (Wash.);

Hessler v. North River Ins. Co., 207 N. Y. Supp. 529;

Bowlin v. Hekla Fire Ins. Co., 31 N. W. 859, 36 Minn. 433;

Mitchell v. Western Fire Ins. Co., 261 N. W. 300;

Graham v. Niagara Fire Ins. Co., 32 S. E. 579 (Ga.);

Barry & Finan Lbr. Co. v. Citizens Ins. Co., 98 N. W. 761 (Mich.);

Ermentrout v. Girard Fire & Marine Ins. Co., 65 N. W. 635 (Minn.);

Harrison v. Hartford Fire Ins. Co., 59 Fed. 732;

Urbaniak v. Firemen's Ins. Co., 116 N. E. 413, 121 Mass. 439.

Certainly the most that can be said here was that Mr. Avery, the Appellee, and Mr. Wing, all personal friends and associates, discussed the possibility of trying to bring Appellees' misfortune within the terms of some insurance policy and obviously Mr. Avery was not speaking or presuming to speak or to be acting for or in behalf of the Appellant, but merely engaging in an academic discussion with the Appellee and Mr. Wing, a stranger to the contract.

It is fundamental that to bind a principal, an agent must be engaged at the time in and about the business of the principal and Mr. Avery certainly was not doing so,

either in his discussions or in his later encouragement of the Appellee to try to bring his situation within the purview of the *Olds Seed Company* case.

See:

Palo Alto Association v. First National Bank, 33 Cal. App. 214, 224, 164 Pac. 1124;

Wittenbrock v. J. A. Parker, et al., 102 Cal. 93, 101, 36 Pac. 374;

Renton Holmes & Co. v. George Monnier, 77 Cal. 449, 453, 19 Pac. 820.

Appellant respectfully submits that the undisputed evidence establishes conclusively that Appellees suffered no direct loss by explosion to the property described in Appellant's policy and that Appellees failed to perform the conditions of the contract of insurance upon their part agreed to be performed and should not recover, and that the judgment of the District Court should be reversed.

Respectfully submitted,

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By E. EUGENE DAVIS,

Attorneys for Appellant.

No. 13090.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARTFORD FIRE INSURANCE COMPANY, a corporation,

Appellant,

vs.

ESLI H. DANIELS and HELEN J. DANIELS,

Appellees.

BRIEF OF APPELLEES.

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No. 13090.

IN THE

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FOR THE NINTH CIRCUIT

HARTFORD FIRE INSURANCE COMPANY, a corporation,
Appellant,

vs.

ESLI H. DANIELS and HELEN J. DANIELS,
Appellees.

BRIEF OF APPELLEES.

Jurisdiction.

Appellees concur in the statement of jurisdiction of the District Court and of the appellate jurisdiction of this Court set forth in Appellant's Brief.

Statement of the Case.

This is an action at law upon a fire insurance policy issued by Appellant to Appellees, a copy of which is attached to the complaint. It contains the usual "extended coverage" endorsement which provides ". . . the coverage of this policy is extended to include direct loss by . . . explosion . . ." and "This company shall not be liable for loss by explosion, rupture or bursting of steam boilers, steam pipes, steam turbines, steam engines or fly wheels . . ." [Tr. p. 15.] The policy was issued on December 1, 1948, upon property owned by Appellees in the amount of \$10,000.00 and on March 9, 1949, the

coverage was increased to \$15,000.00 by endorsement. Both the original policy and the endorsement were executed on behalf of Appellant by Hamman & Avery as its agent. The required premiums were paid, and the policy was in effect at the time of the loss. These facts are admitted by the pleadings. [Tr. pp. 6-25.]

The District Court found that on December 19, 1949, Appellees suffered direct loss to the insured property caused by explosion. [Tr. p. 32.] The nature of the loss is described and the amount thereof is fixed at \$14,450.00. At the trial Appellant admitted the amount of damage to be \$14,450.00, as alleged in the complaint. [Tr. pp. 91, 64 and 8.] The District Court also found that on December 21, 1949, two days after the loss, Appellees notified Hamman & Avery, as agents of Appellant of said loss, and inquired of such agents as to whether or not any action was required of Appellees under the policy. Hamman & Avery, acting as agents for Appellant informed Appellees that their loss was not covered by the policy, and that Appellant was not liable, under the policy for any of the loss. Appellees believed and relied upon this statement of Appellant's agent and refrained from filing proof of loss until more than 60 days after the loss. Appellees did not discover that the loss was covered by the policy until more than 60 days had expired. [Tr. pp. 33-34.]

The complaint alleges, the answer does not deny, and the District Court found that on July 31, 1950, Appellees filed with Appellant's main office in California the Proof of Loss attached to the complaint as Exhibit B [Tr. pp. 16 and 18] and on August 8, 1950, Appellant served on Appellees their notice denying the claim attached to the complaint as Exhibit D. [Tr. pp. 19-20; 9-10; 24; 34.]

The Proof of Loss stated "Notice of said loss was given to an agent of Hartford Fire Insurance Company on or about December 21, 1949. Said agent then informed the assured that said loss was not covered by said policy. By reason thereof, the assured refrained from filing proof of loss." [Tr. p. 16.] Under date of August 8, 1950, in reply to the Proof of Loss, Appellant stated:

"You are further notified that Hartford Fire Insurance Company denies that any loss by explosion, or by any other peril insured against by the afore-referred to policy of insurance, occurred at the premises described therein on December 19, 1949, or at any other time at all." [Tr. p. 20.]

This action was filed in the Superior Court of Los Angeles County on October 9, 1950 [Tr. p. 20], and was removed to the District Court on November 3, 1950. [Tr. p. 6.]

After a trial without a jury the District Court made its Findings of Fact and Conclusions of Law [Tr. pp. 30-35] and rendered judgment against Appellant in the sum of \$14,450.00 with interest and costs. [Tr. pp. 36-37.]

Two questions are presented on this appeal:

1. Did the District Court err in determining that Appellees suffered direct loss to their property caused by explosion?
2. Did the District Court err in determining that Appellant may not take advantage of the delay in filing proof of loss?

Summary of Facts.

Appellant's summary of the facts ignores the elementary principles of physics which prove that Appellees' loss resulted from an explosion. Appellant's own experts admitted the existence of the laws of nature upon which Appellees rely.

Appellees' expert was Simon Perliter, a consulting engineer, specializing in hydraulic and structural engineering. [Tr. p. 89.] He made a careful inspection of the damaged property including a survey of the interior of the building. [Tr. pp. 90-91.] Appellant called John E. Shield a consulting structural engineer [Tr. p. 122], Paul E. Jeffers [Tr. p. 141], Jerome Pinkus, a mechanical engineer [Tr. p. 146], and Prof. Robert L. Daugherty, the head of the mechanical and hydraulic engineering department of California Institute of Technology. [Tr. p. 155.] None of Appellant's engineers except Mr. Shield inspected the property, though the damage was unrepaired at the time of trial and was available for inspection. [Tr. pp. 62, 64, 71, 142, 159.] Mr. Shield's inspection was so perfunctory that he did not even observe whether the drainage of rain water was directed toward or away from the house, yet he gave the opinion that the damage in question was caused by rain water. [Tr. pp. 125, 127-128.] The District Court was obviously not impressed with his testimony. [Tr. p. 131.]

The engineers are in substantial agreement on the existence of the natural laws on which Appellees rely. They are:

1. At sea level, at atmospheric pressure, water boils at 212° F.

2. Water under 45 pounds per square inch pressure boils at 290° F. [Perlitter, Tr. pp. 92-93; Jeffers, Tr. p. 142; Pinkus, Tr. p. 149; Daugherty, Tr. p. 164.]

3. If water under 45 pounds pressure is brought to its boiling point (290° F.) and the pressure is suddenly released, part of the superheated water will suddenly and violently flash into steam. [Perlitter, Tr. pp. 102-103; Jeffers, Tr. pp. 143, 150; Pinkus, Tr. p. 150; Daugherty, Tr. pp. 164-165.]

4. The phenomenon commonly known as "water hammer" is the creation of sudden, excessive and unusual internal pressure in a fluid filled pipe. [Perlitter, Tr. pp. 95, 104, 105; Jeffers, Tr. p. 145; Pinkus, Tr. p. 149; Daugherty, Tr. p. 165.]

5. Water hammer can be caused by the sudden introduction of steam into a water filled system. [Perlitter, Tr. p. 106; Pinkus, Tr. pp. 148-149; Daugherty, Tr. p. 165.]

6. Water hammer is exceedingly destructive. [Perlitter, Tr. p. 95; Jeffers, Tr. pp. 145-146; Pinkus, Tr. pp. 147-148; Ward, Tr. p. 133.]

The Court can take judicial notice of the laws of nature and may refresh its recollection by consulting pertinent reliable works. If the Court examines "Plumbing" by Harold E. Babbitt, Professor of Sanitary Engineering at the University of Illinois (1950), it will find the natural laws applying to this case stated as follows:

"Water at atmospheric pressure boils at 212° F., but if heated under pressure steam is not formed until the temperature rises much higher. At a pressure of 80 pounds p.s.i. the temperature of the water will rise

to 324° F. before the water boils. This high temperature may soften lead or solder used in piping or in the construction of the boiler, thus releasing the water, which, because of its high temperature, suddenly bursts into steam with explosive violence.” [P. 162.]

“Where water under high pressure is heated much over 212° F. trouble will probably be encountered when hot water faucets are opened. The overheated water issuing from the faucet immediately turns to steam, sometimes with explosive violence, and probably with sufficient force to scald the operator of the faucet.” [P. 164.]

These principles applied to the undisputed facts show clearly that Appellees’ loss was caused by explosion.

The water pressure on the water system in the house was 45 pounds per square inch. [Tr. p. 140.]

On the morning of December 19, 1949, Dr. Daniels was awakened by noise from the hot water heater. [Tr. p. 49.] Upon investigation he found that the thermostat had failed to operate, the gas was burning vigorously, and the typical sound of boiling was heard. [Tr. pp. 50, 73.] He turned off the gas, went to an adjoining bathroom and opened the hot water faucet. Steam under heavy pressure issued from the faucet, under pressure enough to blow out the metal anti-splash strips. He then opened the hot water faucet in the kitchen, and steam issued from it. [Tr. pp. 50-51.] *These faucets were left open all day and no water thereafter issued from either of them.* [Tr. p. 52.] (This fact shows that the pipe broke at the precise time at which the faucet was opened. If the pipe had broken before the faucet was opened, the steam would have been vented through the break and there would

have been no pressure at the faucet. If the pipe had broken later, water pressure would, in the meantime, have been re-established at the faucet. [Tr. pp. 97-98, 102, 152.]) During the night Dr. Daniels heard the sound of running water but was unable to locate its source. [Tr. p. 55.] The following day plumbers were called, and they ultimately found that the cold water pipe supplying the heater had broken at a point about ten feet from the heater. [Tr. p. 59.] When the break was found and repaired pressure was restored to the hot water faucets in the bathroom and kitchen. [Tr. p. 60.]

Within a week's time the whole structure of the house changed—floors buckled and walls cracked as a result of the swelling of the adobe sub-soil from water which saturated it as a result of the broken pipe. [Tr. pp. 60-61; 65; 111.] The nature and amount of damage is not in dispute. [Tr. pp. 91, 64.] Appellant's engineer Shield admitted that the damage resulted from water being released under the house by the broken pipe. [Tr. p. 131.]

On December 21, 1949 [Tr. p. 137] Kenneth Wing, the architect of the house conferred with Robert Avery, the agent of Appellant who had signed the policy on its behalf. [Tr. pp. 135, 111-112, 12, 17.] Mr. Wing told Mr. Avery of the damage to the house, that the thermostat on the water heater failed and pressure was built up because of that fact. [Tr. pp. 112-113.] Mr. Wing asked Mr. Avery if the policy covered the loss. Mr. Avery said that he would check with the Los Angeles Office. Avery reported that the policy did not cover the loss. [Tr. pp. 112-113.]

Shortly thereafter, Dr. Daniels, one of Appellees, called Mr. Avery on the telephone and started to tell him about the loss. Mr. Avery said that he already knew about it

because Mr. Wing had inquired about insurance coverage. Mr. Avery told Dr. Daniels that the policy did not cover such a loss. [Tr p. 67.]

Appellees believed Mr. Avery's denial of coverage and refrained from filing proof of loss. [Tr. p. 67.] More than 60 days thereafter Mr. Avery told Dr. Daniels of a recent case similar to this one, said "I think you are covered," and suggested the filing of a claim. [Tr. pp. 67-68, 138-139.] (The decision obviously was *Olds v. Commercial Union Assurance Co.*, 175 F. 2d 472, decided in January of 1950.)

On April 19, 1950, Mr. Avery discussed the matter with Appellant's Los Angeles claims office and requested that proof of loss forms be sent to Appellees' attorney. [Tr. p. 120.] The claim was immediately assigned to the General Adjustment Bureau for investigation, and later John E. Shield, a consulting engineer was employed by Appellant. [Tr. pp. 121-122.]

Appellees gave Mr. Shield complete access to the house. [Tr. pp. 71, 123-124, 128.] Except for the repair to the broken pipe, the house was in the same condition as when the damage was originally done. [Tr. pp. 62, 64.]

Proof of loss was filed with Appellant's head office in California on July 31, 1950 [Tr. pp. 16, 18], and by letter dated August 8, 1950, Appellant denied liability, reiterating Mr. Avery's assertion that the loss was not covered by the policy. [Tr. p. 20.] Appellant admits that Mr. Avery was its agent authorized to execute and deliver policies of insurance. [Tr. p. 24.] His duties as agent included the reporting of losses and claims coming to his knowledge. [Tr. p. 139.]

Direct Loss by Explosion Was Proved.

The broad language of the policy covers all explosions except only "explosion, rupture or bursting of *steam* boilers, *steam* pipes, *steam* turbines, *steam* engines or fly wheels." [Tr. p. 15.] The pipe here involved was a water pipe, not a steam pipe. Steam was not used in the house. [Tr. p. 47.]

Appellant argues that the word "explosion" as used in the policy "is to be taken as understood by an ordinary person." (Brief, p. 10.) This is but another way of saying that the meaning of the word "explosion" is a question of fact. If so, the question is not open to review on appeal. Judge Harrison found that the occurrence proved was in fact an explosion. [Tr. pp. 26, 32-33.] Does Appellant assert that he is not an "ordinary man?"

Gasoline and gunpowder are not the only causes of explosions. As Appellant's own policy indicates, an explosion can occur in solid metal. The very clause here in question excludes "explosion, rupture or bursting of . . . fly wheels."

In *Lever Bros. v. Atlas Insurance Co.*, 131 F. 2d 770, a large tank containing cotton oil burst with great violence and noise. The insurance company claimed this was not an explosion because the damage resulted from great internal stresses in the metal of the tank which were released by the vibration caused by a passing locomotive. The Court said:

" . . . where there are pent-up, imprisoned forces, in such state of instability that the vibration of a passing locomotive is sufficient to cause their release with the force and violence testified to in this case, *that is an explosion.*" (Emphasis added.)

The Lever Bros. explosion occurred in 1940, eight years before this policy was issued, and the case decided in 1942, six years before this policy was written. The implications of the *Lever Bros.* decision must have been well known to Appellant at the time this policy was issued. If Appellant had intended to restrict the explosion coverage of its policy to the typical gasoline and gunpowder types it had ample time to do so. Instead, Appellant placed no limitation upon the meaning of the term "explosion" other than as applied to *steam* boilers, etc., and fly wheels.

In *Bower v. Aetna Ins. Co.*, 54 Fed. Supp. 897, plaintiff's home was insured against loss by explosion. While plaintiff was away the water in the heating radiators froze, expanded and burst the pipes, resulting in severe water damage to the property. The Court held this to be a loss by explosion.

L. L. Olds Seed Co. v. Commercial etc. Ins. Co., 179 F. 2d 472, is a case strikingly similar to the one at bar. There plaintiff's stock of seeds was insured under a fire policy containing an extended coverage endorsement similar to the one here involved. As in the case at bar, a cold water pipe was ruptured as a result of water hammer. As here, it was argued that the bursting of a cold water pipe caused by water hammer is not an explosion. As here, the evidence showed that water hammer is a sudden, excessive pressure far greater than normal. The trial judge, in his instructions to the jury, defined an explosion as a "sudden, accidental, violent bursting, breaking

or expansion caused by internal force or pressure which may be and is usually accompanied by some noise." The jury found that an explosion had occurred. Affirming a judgment in favor of plaintiff, the Court said:

"Professor Kessler, a widely known expert in hydraulics, who has specialized in the study of water hammer, testified that in his opinion the pipe in question burst from 'a sudden excessive pressure, far' greater than the normal pressure in the (water) main, and that the bursting 'would be accompanied by a violent increase in pressure, and undoubtedly noise would occur.' Another expert testified that in his opinion the pipe burst because of water hammer which is 'a very sudden and destructive force of internal pressures—sudden and instant violent pressure.'

"Defendant's argument that cold water does not explode is beside the point. It was the container, the pipe, that gave way with violence. And it should be kept in mind that *the insurance policy did not give protection against big explosions only; the protection afforded was against all explosions, except those specifically excluded.* Defendant argues that the break in the pipe was small, but considering that it was only a 2" pipe, the jagged-edge tear or opening was relatively of considerable size.

"We think that under the evidence *the question of whether an explosion occurred was a jury question.* Considering the physical exhibits, such as the ruptured section of the pipe, as well as the oral testimony, it was permissible for the jury to find that an explosion had occurred. Since plaintiff's damages were a direct consequence thereof, the judgment for the plaintiff must be and is affirmed." (Emphasis added.)

The case at bar, on its facts, is stronger than the *Olds* case. It appears from the record in the *Olds* case that the water hammer which destroyed the pipe was created in the city main as a result of the sudden opening and closing of valves incident to the fighting of a fire in the neighborhood. The record in the *Olds* case also shows that the water in the pipes never attained a temperature of more than 70° F. Wholly absent was a change of state from liquid to gas, as appeared in the case at bar. The *Olds* case determines that the bursting of a pipe by reason of water hammer alone constitutes an explosion within the meaning of the same extended coverage endorsement as the one here involved. In the case at bar the pipe burst as a result of water hammer and the water hammer was created by the sudden violent bursting into steam of superheated liquid water. In the case at bar the elements of a conventional explosion were present. A change of state occurred from liquid to gas when Dr. Daniels opened the bathroom faucet, releasing the pressure on the system and causing part of the water superheated to 290° suddenly and violently to flash into steam. [Pinkus, Tr. p. 50.] The flashing of water into steam was accompanied by violence. [Perlitter, Tr. pp. 102-103; Daugherty, Tr. pp. 164-165.] It was accompanied by noise. [Pinkus, Tr. p. 151; Jeffers, Tr. p. 146.] The energy released by the water flashing into steam was transmitted to the water pipe creating water hammer. [Perlitter, Tr. p. 99; Daugherty, Tr. p. 165.] The internal pressures momentarily created by water hammer are intense, far in excess of working pressures. [Perlitter, Tr. p. 95; Jeffers, Tr. p. 145; Pinkus, Tr. pp. 147-148.] Indeed, they are theoretically infinite. [Perlitter, Tr. p. 95.] The destructive power of water hammer is well

known. In research work Mr. Pinkus destroyed 12-inch cast iron valves with water hammer—valves which stood 5 feet high. [Tr. pp. 147-148.]

At the trial defendant's engineer Shield, the only one who had inspected the Daniels' property, expressed the opinion that the pipe broke because rain water seeped beneath the foundations of the house. Mr. Shield, however, did not observe whether rain water drained toward or away from the house. He did not take into consideration the fact that the pipe broke at the time Dr. Daniels opened the hot water faucet. [Tr. p. 130.] The District Court was obviously not impressed with his testimony. [Tr. p. 131.]

One of the most significant circumstances in the case is the fact that the pipe broke at the very time Dr. Daniels opened the hot water faucet. If the break had occurred prior to that time there could have been no steam pressure on the bathroom faucet. [Perlitter, Tr. p. 99; Daugherty, Tr. pp. 162-163.] If the pipe had not broken at the time the hot water faucet was opened water circulation would promptly have been re-established. [Perlitter, Tr. p. 98; Daugherty, Tr. pp. 163-164.] Thus it is clear that the flashing of the superheated water into steam, the creation of water hammer and the breaking of the pipe occurred at the same time. Appellees' explanation of the occurrence is in accord with the facts and the fundamental laws of nature above referred to.

On page 8 of its brief Appellant says:

"Appellant produced a number of highly qualified experts who testified that the break in the pipe could not have been caused by internal pressure or by water hammer and all of whom concluded that the break in the pipe occurred through external tension,

probably due to the swelling of the adobe soil due to recent heavy rains.”

The record does not bear out this assertion. Appellant's witness Jeffers was unwilling to say that it was impossible that water hammer was the cause of the break in the pipe. [Tr. p. 142.] His only testimony even tending to support Appellant's assertion is:

“Q. Now, you speak of the possible differential movement of the building as a possible cause of the break in this line. Did you observe any evidence of that? A. I didn't even see the building.

Q. You haven't seen the building at all? A. No.” [Tr. p. 142.]

Professor Daugherty frankly said, “Of course, *I don't know what caused the pipe to break in the first place*. I could only hazard a *guess* on that. I *imagine* that the pipe must have broken because of some pull, some tension on it.” And, he also said, “The fact that after this break there was a gap in the pipe would indicate somehow or other that there had been some shifting of the foundations or otherwise that would have put this pipe under tension and pulling that in two at that point and leave the gap. *That is only a guess on my part* because I can't speak with any authority on that, not having been down there and investigated it personally as to what really took place.” [Tr. pp. 158-159.] Again, he frankly admitted “I am unable even to guess how this accident occurred, as I said before.” [Tr. p. 163.] Mr. Shield was the only witness who gave the opinion that the pipe broke because of alleged distortion in the house caused by swelling of adobe soil due to rain. [Tr. p. 125.] But he neither inspected for nor found cracks in the foundations. [Tr. pp.

128-129.] He did not even observe the direction of water drainage. [Tr. p. 128.] Thus it appears that Appellant's explanation of the loss is not supported by the evidence and the District Court properly accepted Appellees' proof of the cause of the loss. The decisions cited are the only ones found which directly apply to the facts of this case, and all of them support the findings of the District Court.

Delay in Filing Proof of Loss Was Waived by Appellant.

Most of Appellant's Brief is devoted to the argument that even if Appellees' loss is covered by the policy, they are entitled to nothing because formal, written proof of loss was not filed with the insurance company's San Francisco office within 60 days after the explosion.

The policy [Tr. pp. 12-15] sets forth the following requirements:

1. Assured must give written notice of loss without unnecessary delay. [Tr. p. 13, line 85.]

2. Within 60 days after commencement of explosion assured must file sworn written proof of loss with insurance company's main office in California. [Tr. p. 13, line 89.]

3. "If the company claims that the preliminary proof of loss is defective and within *five days* after receipt thereof (without admitting the amount of loss or any part thereof) notified in writing the insured, or the party making such proof of loss, of the alleged defects (specifically stating them) and requests that they be remedied by verified amendments the assured or such party within ten days after the receipt of such notification and request must comply therewith, or if unable to do so, present the company with an affidavit to that effect." [Tr. p. 13, lines 98-102.]

Admittedly, proof of loss was filed with Appellant's main office in California on July 31, 1950 [Tr. p. 19] Appellant does not claim that the proof of loss is defective in any particular except that it was filed more than 60 days after the explosion and that Appellees' loss was not caused by explosion. If the claim is valid, the amount demanded is admittedly correct. [Tr. pp. 91, 64.]

The record contains much significant evidence in addition to that printed in Appellant's Brief.

On December 21, 1949, two days after the explosion, both Dr. Daniels and Kenneth Wing talked to Robert Avery, Appellant's agent. [Tr. pp. 111-113, 137.] Mr. Wing explained that the thermostat on the hot water heater failed, that pressure had built up, a water line had broken and the building had been damaged. [Tr. pp. 112-113, 135-138.] Dr. Daniels also talked to Mr. Avery on the same subject, started to explain the occurrence and was told that Mr. Avery already knew all about it. [Tr. pp. 75-76, 136.] Both Dr. Daniels and Mr. Wing specifically asked if the loss was covered by the policy and both were told by Mr. Avery that it was not covered. [Tr. pp. 75-76, 112-113, 134-139.] Mr. Avery was told enough so that he recognized the pertinence of the *Olds* case when he learned of it in April, 1950. [Tr. p. 138.]

Mr. Avery did not tell Appellees to send written notice to the company's San Francisco office, or to file written proof of loss within 60 days. He told them the loss was not covered by the policy. [Tr. pp. 136-138.] Within two weeks Mr. Avery discussed the matter thoroughly with John Kilgore, a special agent of Appellant. [Tr. p. 136.] Relying upon Mr. Avery's denial of liability Appellees refrained from filing proof of loss. [Tr. p. 67.]

In April of 1950 Mr. Avery read of the *Olds* case, called Dr. Daniels, told him the circumstances and suggested that he file a claim. [Tr. p. 139.]

On April 19, 1950, Mr. Avery called Appellant's Los Angeles office and requested that proof of loss forms be sent to Appellees' attorney. Mr. Roy O. Elmore, Appellant's resident manager, called Mr. Avery's partner for information about the claim. [Tr. p. 120.] Though more than 60 days had then elapsed after the explosion it does not appear that any objection was made on that ground. Instead Mr. Elmore assigned the claim to the General Adjustment Bureau for immediate investigation. Several days later a preliminary report was received. The bureau was then ordered to proceed with a "very definite investigation, as far as he could go, and report back to us." John E. Shield, a consulting engineer was then employed to make a further investigation. [Tr. pp. 120-122.]

On May 2, 1950, a report of Perliter & Soring, Appellees' engineers was submitted to General Adjustment Bureau for the account of Appellant. [Tr. p. 16.]

On May 18, 1950, Mr. Shield went to the property. Later he returned with two laborers and was shown through the house by Mrs. Daniels. He returned later with a mechanical engineer. He interviewed the plumbers, the General Adjustment Bureau, Mr. Wing, the architect and Mr. Reynard, his associate. He was given a copy of the house plans. He had complete access to the house. [Tr. pp. 71, 122-124.] He then obtained rainfall data

from the U. S. Weather Bureau and the Palos Verdes Water Company. [Tr. pp. 125-126.] The damage had not been repaired, except the broken pipe. [Tr. p. 70.] He received complete cooperation from Appellees. [Tr. pp. 71, 128.]

Appellant's investigation appears to have continued until about July 10, 1950, and Appellees were not notified of its action until after that date. [Tr. p. 16.]

It is significant that this long and extensive investigation was undertaken merely on the basis of a phone call from Mr. Avery [Tr. p. 120], and no question appears to have been raised regarding the delay in filing proof of loss.

Proof of loss was filed with Appellant's main office in San Francisco on July 31, 1950. [Tr. pp. 18, 16, 19-20.] *Eight days* later, August 8, 1950, Appellant wrote to Appellees denying liability under the policy on the ground that the loss was not caused by an explosion. Then, for the *first* time, Appellant objected to the delay in filing the proof of loss. [Tr. pp. 19-20.]

Appellant argues that even if Appellees' \$14,500.00 loss is covered by the policy they cannot recover because an otherwise proper proof of loss was not filed within 60 days. But Appellant, without any excuse, appears also to be guilty of delay. Admittedly the proof of loss was received on July 31, 1950. [Tr. p. 19.] The policy provides that if the company claims that the proof of loss is defective it may, within *five days* notify the assured of such defects and require them to be remedied by amendments or by an affidavit that the assured is unable so to do. [Tr. p. 13, line 98.] Appellant did not even write its notice until August 8, 1950, *eight days* after the proof of

loss was received. [Tr. p. 19.] Appellant has thus waived its right to object to the delay in filing of proof of loss. We apprehend that Appellant will argue that it would have been idle to object to the delay in filing proof of loss, the 60 days having already passed. But that would have been no more an idle act than filing proof of loss within the 60 day period—because Appellant has consistently denied liability for the loss just as Mr. Avery had already done for it.

The District Court decided that Appellant had clothed Mr. Avery with all indicia of authority as its agent. He could prepare and sign policies on behalf of the company, collect premiums, increase coverage on property, and endorse policies. If he could issue policies he must necessarily have been authorized to discuss policy coverage with the assured. It was his duty to report losses. In this case the Appellant accepted notice of loss merely on the basis of a call from Mr. Avery, for it appears that on April 19, 1950, he asked Mr. Elmore to send proof of loss forms to Appellees' attorney, and in its letter of August 8, 1950, the company admits notice of loss on April 19, 1950. [Tr. pp. 19, 121.] This informal call from Mr. Avery was enough to launch a long and intensive investigation including the employment of consulting engineers. Mr. Avery's authority to deny liability under the policy was not questioned until Appellant answered the complaint in this action.

In the course of the investigation brought about by Mr. Avery's call to Mr. Elmore Appellant's engineers were given full access to Appellees' home, their engineer's report and plans of their house. Appellant gave serious consideration to Appellees' claim, with full knowledge that the 60-day period for filing proof of loss had already passed.

In spite of this Appellant did not object to the delay in filing formal proof of loss.

Section 554 of the California Insurance Code provides:

“§554. *Waiver of delay*: Delay in the presentation to the insurer of notice or proof of loss is waived *if caused by an act of his*, or if he omits to make objection *promptly and specifically* upon that ground.” (Emphasis added.)

Admittedly from April 19 to August 8, nearly 4 months, Appellant knew that Appellees claimed that their loss was caused by explosion and that they sought indemnity under the policy. No objection to the delay was made during that period. Instead, Appellant conducted its investigation and accepted Appellees’ full cooperation in connection therewith. Clearly, therefore, regardless of the nature and extent of Mr. Avery’s authority, Appellant waived the delay in making proof of loss.

Appellant now argues that Mr. Avery’s denial of liability was merely an academic discussion and that obviously Mr. Avery was not speaking or presuming to speak or act on behalf of Appellant. This is not supported by the record. Mr. Avery was admittedly Appellant’s agent. [Tr. pp. 12, 66.] He signed the policy in question as such agent. [Tr. p. 12.] His duties as such agent included the reporting of losses and claims of which he acquired knowledge. [Tr. p. 139.] Mr. Wing specifically asked whether or not this loss would be covered by the “comprehensive clause” and was told that Avery would check it with Los Angeles. [Tr. p. 112.] Mr. Avery discussed the matter thoroughly with the special agent of Appellant. [Tr. p. 136.] Appellees had suffered a \$14,450.00 loss. That was not academic. They had pur-

chased and paid for insurance and asked the agent of the insurer if the policy covered their very real and severe loss. It would be difficult to conceive of a less academic discussion.

Appellant concedes that the general rules of agency apply to insurance contracts. (Br. p. 32.) It is a fundamental principle of the law of agency that ratification by the principal is equivalent to precedent authority in the agent.

The question here involved as we see it is not whether Mr. Avery had authority to waive the filing of proofs of loss within 60 days. The question is whether Mr. Avery had authority to tell Dr. Daniels that the loss was not covered by the policy, and if he lacked such precedent authority whether or not his act was ratified.

It is clear from the evidence that Mr. Avery told Dr. Daniels that this loss was not covered. [Tr. p. 67.] That he knew the facts is clear for he immediately recognized the *Olds* case as being in point when its existence was brought to his attention in April of 1950. [Tr. pp. 138-139.]

Aside from the apparent authority with which Appellant clothed Mr. Avery, it is clear that his act in notifying Appellees that their loss was not covered by the policy has been unequivocally ratified by Appellant, by every act which it has performed, beginning with its notice dated August 8, 1950, and continuing to the filing of its brief in this Court.

On August 8, 1950, after a full investigation of the facts, Appellant formally denied that "any loss by explosion, or by any other peril insured against" by the policy had occurred. [Tr. p. 20.] Appellant's answer in

this case denied that the loss was caused by an insured peril. [Tr. p. 23, 8.]

At the trial Appellant unsuccessfully tried to prove by numerous witnesses that the loss was not covered by the policy.

In this Court a similar contention is urged. Certainly, all of these acts must have been performed with the authority of Hartford Fire Insurance Company.

Thus, Appellant with full knowledge of all of the facts, obtained from its own detailed investigation and from the evidence produced in Court, still does exactly the same thing that Mr. Avery did on December 21, 1949—it denies most emphatically that the loss is covered by its policy of insurance. It would indeed be difficult to find more clear or unequivocal ratification of Mr. Avery's act in telling Dr. Daniels that his loss was not covered by the policy. The legal situation, therefore, is exactly the same as if Appellant's fountainhead of authority in San Francisco or in Hartford had told Appellees on December 21, 1949, that their loss was not covered by the policy.

It has long been settled by well considered decisions that if, within the time during which proofs of loss may be filed, an insurance company denies liability under its policy the filing of proof of loss is waived.

Francis v. Iowa, etc. Ins. Co., 112 Cal. App. 565;

Grant v. Sun Indemnity Co., 11 Cal. 2d 438;

Royal Insurance Co. v. Martin, 192 U. S. 149, 42 L. Ed. 385;

Fidelity Phoenix Insurance Co. v. Haywood, 71 F. 2d 834;

Bank of Oroville v. Minnesota, etc., Insurance Co., 132 Cal. App. 510;

Martin v. Postal, etc. Insurance Company, 31 Cal. App. 2d 329;

Mercer Casualty Co. v. Lewis, 41 Cal. App. 2d 918;

Paez v. Mutual, etc. Insurance Co., 116 Cal. App. 654.

In *Francis v. Iowa, etc. Insurance Co.*, 112 Cal. App. 565, the insurance company denied all liability under its policy within the 60-day period allowed for filing proof of loss. No proof of loss was ever filed. The Court held that the company's denial of liability within the 60-day period waived the filing of proof of loss. The Court said:

"The insurance company waived the provision of the policy requiring sworn proof of loss to be furnished by denying its liability. In *Lee v. United States Fire Ins. Co.*, 55 Cal. App. 391, 396 [203 Pac. 774, 776], it is said:

'The denial of such liability prior to the expiration of the time to make proof of loss is a waiver of the condition of the policy requiring such proof. (*Farnum v. Phoenix Ins. Co.* 83 Cal. 263 [17 Am. St. Rep. 233, 23 Pac. 869]; *Royal Ins. Co. v. Martin*, 192 U. S. 149 [48 L. Ed. 385, 24 Sup. Ct. Rep. 247, see also, *Rose's U. S. Notes*].)' "

The Court also said:

"In the absence of fraud on the part of an insured, a court should carefully examine the evidence regarding the failure to furnish proof of loss by fire *so as to avoid a forfeiture of legitimate claims merely because of technical omissions.*" (Emphasis added.)

In *Grant v. Sun Indemnity Co.*, 11 Cal. 2d 438, the Court said:

“It is a well-recognized rule, which we conclude is applicable to the special circumstances here, that the insurer may not repudiate the policy, deny all liability, and at the same time be permitted to stand on a provision inserted in the policy for its benefit.”

In *Royal Ins. Co. v. Martin*, 192 U. S. 149, 42 L. Ed. 385, the Court said:

“A general, absolute refusal to pay in any event, or a denial by the company of all liability under its policy, dispensed with such formal proofs as a condition of its liability to be sued, and opened the way for a suit by the assured in order that the rights of the parties could be determined by the courts according to the facts as disclosed by evidence.”

The Courts generally look with disfavor upon technical defenses which deny an insured a recovery for an insured loss. In *Bank of Oroville v. Minnesota etc. Ins. Co.*, 132 Cal. App. 510, the Court said:

“The law abhors forfeitures of contracts. The question of a waiver of this provision of an insurance policy depends upon the circumstances of each particular case. Where a cause of action upon an insurance policy for recovery of loss sustained on account of fire is otherwise valid, the question of *a mere delay in filing the required proof of loss, or the waiver thereof, will be determined in favor of the insured when this may be reasonably done without violence to the facts of the case.* In 5 Joyce on Insurance, sec-

ond edition, page 5564, it is said, concerning the question of waiver: 'The question concerning whether or not there has been a waiver of this provision must in all cases depend upon the circumstances of each particular case. *The courts will construe this provision, as a rule, against the insurer, and will not scan very closely evidence introduced by the insured tending to rebut a technical forfeiture.*'" (Emphasis added.)

Fidelity-Phoenix Ins. Co. v. Haywood, 71 F. 2d 834, is strikingly similar to the case at bar. It was an action on a fire insurance policy which required the filing of proof of loss within sixty days after the fire and also provided that no agent had power to waive any policy provision except by writing endorsed thereon. A fire loss occurred. Before the expiration of the sixty-day period for filing proof of loss, Rieger, the local agent of the insurance company, notified the insured that his policy was cancelled as of the date it was issued on the ground that at that time the assured did not have title to the property. Proofs of loss were not filed within the sixty-day period. The insurance company defended on two grounds: First, that the assured did not own the property at the time the policy issued and, secondly, that proof of loss was not filed within the sixty-day period. The Court found that the assured did own the property at the time the policy was issued and that the filing of proof of loss was waived by the denial of liability by Rieger. The Court pointed out that Rieger, the local agent, was authorized to solicit business, issue policies and collect premiums, but that such

authority did not include adjustment of losses. Affirming the judgment of the District Court, the Circuit Court said:

“We come then to the somewhat narrow question as to the *authority of the local agent to bind the insurer by a denial of liability*. The evidence of the agent Rieger was that he was authorized to solicit business, issue policies, and collect premiums. Clearly this authority does *not* include adjustments of loss. The adjuster was Harrison. Harrison did not deny liability, although he refused to furnish the assured with proof of loss forms. We do not, however, base our conclusion as to waiver upon any acts of Harrison. It was Rieger, however, who returned the premium, and notified the assured of the cancellation of his policy. Such acts are not ordinarily within the authority of one employed to solicit business. The authority to cancel a policy, and the statement of the reasons for such cancellation, are inseparably associated. The inference is inescapable that Rieger had either general authority to cancel policies for the reasons given or was expressly empowered to do so in the instant case. *Aside from this* the insurer asserts the cancellation of the policy by it. *It cannot now deny its agent’s authority to send the notice of cancellation, nor to specify the reasons upon which such cancellation was based, and this is in our view equivalent to a complete denial of liability.*” (Emphasis added.)

If the quoted portion of the *Haywood* case is read with the name “Avery” substituted for the name “Rieger” the pertinence of the decision will be doubly apparent.

See also, *New York Life Insurance Company v. Eggleston*, 96 U. S. [6 Otto] 572, 24 L. Ed. 841, wherein the Court said on the subject of waiver:

“The representations, declarations or acts of an agent, contrary to the terms of the policy, of course will not be sufficient, unless sanctioned by the company itself. . . . But where the latter has, by its course of action, ratified such declarations, representations or acts, the case is very different.”

If Mr. Avery had admitted liability and had adopted a course of conduct different than that which has consistently been followed by Appellant it might have ground for complaint. But Mr. Avery, either with or without prior authority, did exactly what Appellant is now doing and has consistently done since it acquired knowledge of all of the facts. We submit that to allow an insurance company to repudiate an obligation because its agent did exactly what the very highest authority in the company would have done and is now doing would be a gross miscarriage of justice.

Appellant admits that Mr. Avery had authority to issue policies. In order to do this he must have had knowledge of the perils to be insured against and to discuss those perils and the coverage of policies with the assured. If he had authority to discuss coverage before a loss it is difficult to understand why he could not discuss policy coverage after a loss had occurred.

Conclusion.

The Trial Court's finding that Appellee's loss was caused by explosion is supported by the evidence and the law. The insurance company's agent received almost immediate notice of the loss. He told Appellees that the loss was not covered by the policy. Within two weeks thereafter he discussed the matter with Appellant's special agent. In April of 1950 he called Appellees' attention to the decision in the *Olds* case and recommended the filing of a claim. The Los Angeles Claims Office then undertook a complete investigation and after that was finished confirmed its agent's denial of liability. In order to avoid payment of a just claim it now asserts that its agent was not authorized to deny liability on its behalf. Appellant does not show how the delay in filing proof of loss has prejudiced it in any way.

We believe that the findings of the District Court are in accord with both the facts and the law applicable to the case and that the judgment should be affirmed.

Respectfully submitted,

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